15 US 396

# RECORD, CASE NO. 15058.

883

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 759.

JOHN POINTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JUNE 18, 1892.

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1 UNITED STATES OF AMERICA,
*Western District of Arkansas:*

In the circuit court, February term, A. D. 1892.

UNITED STATES
*vs.*
JOHN POINTER. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Samuel E. Vandiveer, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Pointer, with a certain axe, which said axe he, the said John Pointer, in his hand then and there had and held then and there feloniously, wilfully, and of his malice aforethought did strike, cut, penetrate, and wound him, the said Samuel E. Vandiveer, in and upon the right side of the head of him, the said Samuel E. Vandiveer, giving to him, the said Samuel E. Vandiveer, then and there, with the axe
2 aforesaid, in and upon the right side of the head of him, the said Samuel E. Vandiveer, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Samuel E. Vandiveer, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer him, the said Samuel E. Vandiveer, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

3 *2nd count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Samuel E. Vandiveer, a white man and not an Indian, then and there being feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer, with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did *did* strike, beat, bruise, and wound him, the said Samuel E. Vandiveer, in and upon the right side of the head of him, the said Samuel E. Vandiveer, giving

to him, the said Samuel E. Vandiveer, then and there, with the
4 axe aforesaid, in and upon the right side of the head of him, the said Samuel E. Vandiveer, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Samuel E. Vandiveer, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer him, the said Samuel E. Vandiveer, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

5 *3rd count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William D. Bolding, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did strike, cut, penetrate, and wound him, the said William D. Bolding, in and upon the right side of the head of him, the said William D. Bolding, giving to him,
the said William D. Bolding, then and there, with the axe afore-
6 said, in and upon the right side of the head of him, the said William D. Bolding, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound the said William D. Bolding then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer him, the said William D. Bolding, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

7 *4th count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D., 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William D. Bolding, a white man and not an Indian, then and there being, felo-

niously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did *did* strike, beat, bruise, and wound him, the said William D. Bolding, in and upon the right side of the head of him, the said William D. Bolding, giving to him, the
8 said William D. Bolding, then and there, with the axe aforesaid, in and upon the right side of the head of him, the said William D. Bolding, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said William D. Bolding, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer him, the said William D. Bolding, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

(Indorsed:) No. 37. United States vs. John Pointer. Murder. A true bill. Lewis R. Hawkins, foreman. Witnesses: P. B. Bolding, Eureka Springs, Ark.; Wm. R. Vandiveer, near Keeter, Texas; James Wilkinson, near Keeter, Texas; John H. Neal, Wilburton, I. T.; Wm. G. Beard, 4 mi. west Wilburton, I. T.; Wm. Snow, 4 mi. west of Wilburton, I. T.; John Brown, Harrellton, Ark.; W. B. Gillett, McAlister, I. T.; John Lutz, McAlister, I. T.; W. J. Vandiveer, near Keeter, Texas; T. C. Symon, 3 mi. west Wilburton, I. T.; H. C. Flippo, Wilburton, I. T.; Peter Adamson, Wilburton, I. T.; Jack Phillips, 4 mi. west Wilburton, I. T.; Oliver B. Fetter, 4 mi. west Wilburton, I. T.; Minnie Jones, Hartshorn, I. T. Filed Feb'y 9th, 1892. S. Wheeler, clerk, by I. M. Dodge, D. C.

9 In the circuit court of the U. S. for the western district of Ark.

TUESDAY MORNING, 9 O'CLOCK, *February 9th, A. D.* 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
*vs.* } Indictment for murder. No. 37.
JOHN POINTER.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, whereupon Messrs. Peel and Byers were appointed to defend the said defendant; and the said defendant having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment, and puts himself upon the country.

Whereupon this cause, by agreement of parties, was by the court set down for trial March 14th, 1892.

WEDNESDAY, *March 23rd*, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and files a motion to quash the indictment in this cause.

Said motion coming on to be heard and the court, being well and sufficiently advised in the premises, doth overrule said motion.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, J. C. Hodges, esq., and C. I. Davis, esq., and it appearing from the returns of
10 the marshal that the said defendant has been served with a duly-certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that he has also been served with a full and complete list of the petit jury as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having had hearing of said indictment heretofore and pleaded not guilty thereto, it is on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined: Whereupon the clerk called the entire pannel of the petit jury, and after challenge by both plaintiff and the defendant the following were selected for the trial of this cause, to wit:

| | | |
|---|---|---|
| John A. Bankes, | James F. Crocker, | Nelson S. Parker, |
| Francis M. Barrick, | Perry Keyser, | Andrew J. Ray, |
| Saml. W. Calhoun, | Jas. D. McGregor, | Wm. S. Williams, |
| Simon F. Cooper, | Geo. W. McCaslin, | Richd. H. Ravencroft, |

Twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render' according to the law and the evidence, and after hearing a statement of the case by the attorneys for plaintiff and defendant, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn ba'liff of this court.

And it is further ordered by the court that the said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and ba'liff in charge until discharged by order of said court.

11 THURSDAY, *March 24th*, 1892.

On this day come the said defendant, by his attorneys, and files a motion to require the district attorney to elect on which count of the indictment in this cause he will proceed.

Said motion coming on to be heqrd and the court being *wel* well and sufficiently advised in the premises, doth overrule said motion.

SATURDAY MORNING, *March 26th*, 1892.

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come said defendant in custody of the marshal, and by his attorneys, J. C. Hodges, esq., and I. C. Davis, esq.; and now come the jury heretofore empaneled for the trial of this cause, ic charge of a sworn ba'liff of this court, to wit, * * * who took their seats in the jury box and, after receiving the

charge of the court, retired in charge of the sworn ba'liff aforesaid to consider of their verdict, and after some time returned into the court the following verdicts, to wit:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment.

(Signed.) "F. M. BARRICK, *Foreman.*"

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count of the indictment.

(Signed.) "F. M. BARRICK, *Foreman.*"

Whereupon, the jury was by the court discharged from the further consideration of the case, and the said defendant remanded to the custody of the marshal to await the final sentence.

12 *Bill of exceptions.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES
*vs.*
JOHN POINTER. } Murder.

Be it remembered, that in the trial court before the Hon. I. C. Parker, the following proceedings were had, to all of which the defendant, John Pointer, then and there excepted:

First. Defendant filed a motion to quash the indictment herein, which motion is as follows:

(Caption omitted.)

"Now comes the defendant in the above-entitled cause and moves the court to quash the indictment presented herein against him for the following reasons, viz:

"1st. Said indictment does not commence in the name of the United States of America, as required by law.

"2nd. Because said indictment charges two distinct and different offences, to wit, the murder of Samuel E. Vandiveer, and the murder of William D. Bolding.

"3rd. Because said indictment does not show affirmatively that the grand jury that presented the indictment was empanel'd by a court of the United States of America.

"4th. Because said indictment does not appear upon the face thereof to have been presented and filed in a court having jurisdiction to try the defendant for the offense of murder committed in the place where the offense is charged to have been committed."

C. B. DAVIS & J. C. HODGES,
*Att'ys for Def't.*

13 The court overruled said motion.

Second. The defendant filed a motion praying the court to require the district attorney to elect upon which count in the indictment he would claim a conviction, which is as follows, to wit:

(Caption omitted.)

"Now comes the defendant, John Pointer, and moves the court to now require the Government's counsel to elect upon which count or counts in the indictment he will now try defendant.

"Defendant demands that he be informed affirmatively who he is being tried for murdering before his att'ys are required to cross-examine any witness offered by the Government.

"Wherefore defendant prays that this cause proceed no further until the dist. att'y elects upon which count in the indictment he will try this defendant."

(Signed.) C. J. DAVIS & J. C. HODGES,
*Att'ys for Deft.*

The court overruled said motion and required defendant to go to trial upon the four counts contained in the indictment.

Third. The defendant was furnished a list of jurors, 37 in number, generally qualified under the law, that he might make his challenge from the list of 37 of any number not to exceed 20, and at the same time the prosecuting attorney had a duplicate list of the same names from which he could challenge any number not to exceed five, and the remaining first 12 names not challenged would constitute the jury. The defendant objected to this manner of selecting a jury 1st, because it was not according to the rule prescribed by the laws of the State of Arkansas; 2nd, because it was not the rule practiced by common law courts; 3rd, because the defendant could not know the particular jurors before whom he would be tried until
14 after his challenges, as guaranteed by the statutes of the United States, had been exhausted; 4th, because the Government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know the twelve men before whom he was to be tried were until after his right to challenge was ended.

Fourth. After the empanelling of the jury and statement of the case the Government, to maintain the issues upon its part, produced the following-named witnesses, to wit, Thos. C. Symons, W. G. Beard, J. H. Neal, Minnie Jones, P. B. Bolding, Wm. J. Vandiveer, Harvey C. Flippo, O. B. Fetter, Willis V. Gillett, Wm. R. Vandiveer, James Wilkerson, Wm. H. Snow, Jack Phillips, Jno. Lutz, & W. B. Pape, who testified respectively as follows:

15 In the circuit court of the United States with and for the western district of Arkansas, February Term, 1892.

UNITED STATES
*vs.*
JOHN POINTER. } Murder.

TRANSCRIPT OF TESTIMONY.

Before his honor I. C. Parker and a jury.

Appearances: For the Government, W. H. H. Clayton, U. S. dist. att'y; for the defendant, Messrs. J. C. Hodges and C. J. Davis.

Trial commenced at Fort Smith, Arkansas, Wednesday evening, March 23rd, A. D. 1892, at 4 o'clock.

16 The COURT (to the district attorney). What say you on behalf of the Government, Mr. Clayton?

The DISTRICT ATTORNEY. We are ready, your honor.

The COURT (to counsel for defendant). What say you on behalf of the defendant, gentlemen?

Mr. HODGES. We desire to file a motion to quash the indictment in this case.

The COURT. Very well.

(Motion to quash indictment filed.)

The COURT (after hearing the motion to quash read, and after counsel agreeing to submit same without argument). I do not think any of these positions are well taken, and the motion is overruled.

Mr. HODGES. We desire to save our exceptions.

The COURT. Very well.

Mr. HODGES. The defendant some time ago was served with a list of 37 jurors, and on the 16th of March he was served with an additional list. We do not understand that in a case of this magnitude the jurors can be served by piecemeal, and desire to object to the method of serving.

The COURT. In the first place the list of 37 was served, and it always happens that some of the original 37 can not serve, by reason of incompetency or sickness, and out of an abundance of precaution we have the additional list served on the defendant, so that there will be a sufficient number served to go on with the trial of the case without waiting for two days' service on the defendant when the case is called for trial. It is not service by piecemeal, but service of additional talesmen.

17 Mr. HODGES. I will just state, so that I will not appear captious, that in cases of this magnitude we deem it best to save all the exceptions possible, and hence I will just note that.

Our exception is that we object to now being required to announce without being served with a full list of the jurors; that is, we do not announce at all, but are forced to over our objection.

The jury were then examined as to their qualifications, and 37 men were found to be qualified to sit on this case; whereupon the Government and defendant were each furnished with a list of the 37 men so selected, and each were required to strike out those they did not wish to serve, the defendant being allowed to strike out 20 names and the Government five.

Mr. HODGES (of counsel for the defendant). I desire to save an exception to this method of forming the jury. It does not follow the State law of Arkansas, neither does it follow the common law, and we except to it on that ground. The point we make is that the Government must offer us the twelve men they want to try the case.

The COURT. They offered you 37.

Mr. HODGES (of counsel for defendant). We understand, but we want to save that point.

The district attorney then proceeded to open the case to the jury upon behalf of the Government, and during the course of his opening statement said: This defendant and his father lived at Eureka Springs, in the State of Arkansas. Mr. Bolding, the father of one of the young men who were killed, was a resident of the city of Eureka Springs, as was also his boy who was killed. Mr. Vandevere, also the father of one of the

deceased, was a resident of Carrol' County, Arkansas, until about
18 8 or 9 years ago he moved to the State of Texas, where he lived at the time his son was killed. Ed. Vandevere, one of the deceased, left Texas and went back to Carrol' County and staid awhile with his friends, and while there he formed the acquaintance of the defendant. He then went back to Texas, the defendant accompanying him and William Bolding, the other deceased. The defendant had some trouble up in Missouri; was charged with some things that we will not claim here now——

Which last remark of the district attorney was objected to by counsel for the defendant on the ground of its being improper, which objection was overruled by the court; to which ruling of the court the defendant then and there duly excepted.

The district attorney further stated in the course of his opening statement of the case that as soon as Mr. Vandevere, the father of one of the deceased, learned, through a newspaper, of the finding of the bodies of these two men, and thinking from the description given it might be the bodies of his son and William Bolding, he at once set down and wrote a letter to the United States marshal of the western district of Arkansas, Mr. Yoes, which letter the marshal answered, but before Mr. Vandevere received the letter written him by the marshal he started to this place (Fort Smith); to which statement of the district attorney counsel for defendant objected on the ground that what anybody else done had nothing to do with this case as far as the defendant was concerned, which objection was by the court overruled, to which ruling of the court the defendant then and there at the time duly excepted.

When the district attorney had finished his opening statement of
19 the case to the jury, counsel for defendant opened the case in behalf of the defendant, at the conclusion of which court adjourned until Thursday morning, March 24th, A. D. 1892, 9:00 o'clock.

Thursday morning, March 24th, 1892, at 9:00 o'clock court met pursuant to adjournmet, when the following motion was filed by counsel for defendant:

Which motion was overuled by the court; to which ruling of the court counsel for the defendant duly excepted.

The district attorney then proceeded to introduce his evidence, as follows:

20 THOMAS C. SYMONS, having been duly sworn upon behalf of the Government, was examined by the district attorney, William H. H. Clayton, and testified as follows, to wit:

Question. Where do you live?

Answer. At Wilburton, three miles and a half west of Wilburton.

Q. Do you know the defendant, John Pointer?

A. No, sir.

Q. Never have seen him?

A. No, sir; not that I know of.

Q. Did you know in his lifetime a man by the name of Samuel E. Vandevere?

A. No, sir.

Q. Did you know a man by the name of William D. Bolding?

A. No, sir.

Q. This defendant is charged with the murder of those two men. I will get you to state if you know or have any knowledge of a killing that occur'ed up near your place?

A. I know nothing about the killing, but I know I found the bodies of two murdered men up there.

Q. Where did you find the two bodies?

A. I found them on the morning of the 26th of December on the branch where they were *thr* thrown, in the branch about 250 yards from the house where I lived, or something near that.

Q. You found them the day after Christmas?

A. Yes, sir.

Q. How came you to find them?

A. I was out rabbit hunting on the morning of that day, and I went out on that branch to hunt some rabbits, and found the bodies lying in the bed of the branch.

Q. Go on now and state minutely and particularly what you did.

21 A. I was about ten or fifteen steps from them when I saw them. I could not tell just how far.

Q. Where did you find them?

A. Found them in the bed of the branch. I was walking along down the branch, and I saw them right in the bed of the branch. I could see one of them distinctly; the other I could not see only a part of it. I knew they were two persons. I didn't know who they were or nothing about it.

Q. Did you know they were dead when you first saw them?

A. No, sir; I 'lowed they might be laying there on the leaves asleep.

Q. What did you do?

A. I went back to the house where I live and got a man that lives with me——

Q. Who was that man?

A. James Neal. And went to a hay camp there was about 200 yards from where we lived, right across the slough, to see if there was any parties out from the camp: there was nobody in the camp when we got there but one gentleman by the name of Flippo, and he said there was nobody out that he knew of from his camp. I told him there was somebody I found there dead or dead drunk, I didn't know which.

Q. Did Mr. James Neal go with you to the camp?

A. Yes, sir.

Q. You got Flippo?

A. Yes, sir.

Q. What did you do?

A. We went back to see whether the parties were dead, or whether it was some drunken parties there. And we went down on the other side of the branch from where I saw the bodies, on the bluff side, and in going to the bodies we come to the camp fire there just before we saw the bodies.

Q. The camp fire?

A. Yes, sir; where there had been one; there was still fire there.

22 Q. How far was that camp fire from the bodies?

A. It was probably somewhere between 15 and 20 steps; I could not say positively.

Q. On the bluff side of the creek?

A. Yes, sir.

Q. Go ahead.

A. We saw the camp fire; and we saw blood around the camp fire, from there to the bodies; we followed the trail of the blood and saw the two men; saw they were dead.

Q. How high was that bluff?

A. Six or seven feet.

Q. Please state if it was straight up and down.

A. It was nearly straight up and down. The creek ran around and made a rather of a horseshoe bend, and it was on the side where the current had cut the bank.

Q. You found where the camp fire had been—the fire was not yet out—on the bluff side of the creek; where did you find the blood?

A. There was blood right at the camp fire. There was some sticks of wood that had been burned off, just the stubs of sticks; one I noticed that had blood and hair on it. There was quite a lot of blood around there, and blood all the way from the fire to the creek.

Q. Did you observe the particular location of any other blood that you speak of?

A. No, sir; I was not able to make any search or locate anything at that time. We saw the men were dead; and as soon as we saw they were dead we said we would have to go to Wilburton and give the alarm and find out what to do.

Q. Did you go down in the creek where they were?

A. No, sir; we just stood on the bank and saw they were dead.

Q. Then you could not tell anything about the wounds on their persons?

A. No, sir.

Q. How were they located in the creek?

A. Lying right close together, side by side; their heads were
23 both one way; doubled up; their arms was as though they had just fell off—been thrown off the bank. Their heads were both towards the low side of the creek and their feet towards the bluff bank.

Q. When you discovered these men were dead, please state if you made any observations around there before you left?

A. Nothing only right at the fire; we noticed there was a pan set on the fire and a rock in the pan, and a broken jug near the fire, right by the fire; that is all I noticed at that time.

Q. Did you notice anything in the jug?

A. No, sir; there was not anything in the jug that I could see; the jug was broken in two, just about half the jug in pieces.

Q. So you did not see what it contained?

A. No, sir.

Q. Then what did you do after you discovered they were dead bodies?

A. We went on to Wilburton to find out if there were any parties over there that would know anything about it, and find out what to do with the dead bodies, and when we got there they told us to dispatch for an officer,

and I dispatched to Red Oak for a notary public and Mr. Flippo gathered up a crowd and went back. I did not go back, but waited for an answer to my telegram.

Q. Did you go back at all?

A. Yes, sir; about 2:00 o'clock in the afternoon.

Q. Did you find anybody there when you got there about 2:00 o'clock?

A. Yes, sir; there was quite a crowd there when I got back.

Q. Did you make any further observations when you got back?

A. When I got back there everything had been gathered up around the fire.

Q. Did you know who these men were?

A. No, sir.

24 Q. What was done with the bodies, if you know?

A. The bodies were taken to Wilburton and buried.

Q. Were you along?

A. Yes, sir.

Q. Did you observe anything about the wounds then at that time?

A. Yes, sir; I noticed the wounds. I helped carry them out of the creek and washed them, and put them in the wagon.

Q. Can you describe the men?

A. Well, I do not suppose I could give a very good description. One of them was a man I should judge to be about 30, or something near that—that would have been my judgment of him at the time; he was a cripple; the left side was crippled.

Q. How do you know that?

A. One foot was small, diminished in size, and then he was thrown out of shape; could not be straightened out. We could not straighten the leg; we undertood to straighten the leg when we undertood to put him in the coffin, and we noticed the side was smaller, and the arms smaller than the other side.

Q. One side of the man?

A. Yes, sir; shoulders, arms, and legs.

Q. Did you observe whether there were any wounds on that man?

A. Yes, sir; one wound is all we could see.

Q. Where was that?

A. It was in the top of the head as near as I can recollect.

Q. What kind of a wound was it?

A. It was a wound as though it had been done with the pole of an axe or some heavy instrument, ist crushed the skull in, broke it in entirely across.

Q. That was the lame man?

A. Yes, sir.

Q. How old a man was the other man?

25 A. The other man was a younger man, probably 20 or near 20.

Q. State if he had any wounds upon him.

A. Yes, sir; he had four wounds on the head.

Q. What kind of wounds were they, and where?

A. There was three on the head, in different parts of the top of the head that were done with some instrument that broke the skull; the skull was broken considerable. There was one slight wound over the eye here; might have been a bruise done by throwing him off, or might have been

in some way, I don't know; could not tell. On the right side, I think, his throat was cut. The knife had been stuck in, it looked like, from the gash, the length of the blade and cut out.

Q. You took these two men to what place when you buried them?

A. Wilburton.

Q. How far is Wilburton from the place where the bodies were found?

A. About three miles and a half.

Q. On the railroad?

A. Yes, sir.

Q. What railroad is that?

A. Choctaw Coal and Railway Co. road.

Q. How far is Hartshorn from there, and in what direction?

A. Hartshorn is 12 miles west.

Q. What direction is Wilburton?

A. East.

Q. South McAlester?

A. West.

Q. How far is South McAlester from where the bodies were found?

A. It is something near 27 miles, I think; I think it is, but I would not be positive, but it is near that.

Q. This occurred in what Nation?

26 A. Choctaw Nation, Indian country.

Q. How was this place where the bodies were found with reference to the Choctaw Railroad; on which side?

A. It is on the south side.

Q. How far south of that railroad?

A. It is probably not over half a mile—no, it is not half a mile; it is between a quarter and half a mile.

The COURT. I did not catch your description about the wounds on the second man you described; were there any incised wounds except the wound in the throat?

A. No, sir; none that looked like they had been done with a knife except the one in the throat.

The DISTRICT ATTORNEY. What the court means, was there any that was cut with any sharp instrument?

A. No, sir; none except that.

Cross-examination by Mr. J. C. HODGES:

Question. You say there was but one wound on the cripple man?

Answer. That is all I saw.

Q. Show the jury where that wound was located?

A. As well as I remember it was on the top of the head, like as though he had been struck squarely on top of the head and mashed the head in.

Q. Was it on the top or the side of the head?

A. It was rather to one side.

Q. Which side of the top?

A. I could not say positively.

Q. I will ask you whether or not it came to the front of his head, too?

27 A. It was mashed down to the front, but the broke in part was back here.

Q. The front of the head was mashed in?

A. Yes, sir.

Q. Locate with your hand as near as you can where the broken part of the skull was?

A. It was along in around here (indicating) as near as I can remember.

Q. You saw no other evidence of injury on that part of him?

A. No, sir.

Q. You say that seemed as though is was probably done with the pole of an axe?

A. Yes, sir; it looked as though it might have been done that way.

Q. The other party you say had three wounds upon the head?

A. There was four upon the head—that is, there was one small wound over the eye, and then there was three on top of the head.

Q. What was the character of these wounds on the head?

A. As though they had been struck with some blunt instrument, or someth ing; just cut the skull through to the bone; the bones were all broken; in washing the person, you could feel the bones were all loose in the top of the head.

Q. I will ask you if the wounds on the head of the one that had the three wounds was mashed in with the same instrument as the other was?

A. I could not say whether it was or not.

Q. I will ask you if it is not a fact that the wounds on the head of the one who had the three wounds did not seem to have been done with a club, or something, and not with an axe; they were not cut in alike, were they?

A. No, sir; they were not cut in alike exactly; they were not as large wounds as the other.

Q. It seemed more like a bruise on that one than a lick with an axe, or a cut?

A. They were cut in; they did not seem to be bruised much.

28 There on top seemed to be three separate gashes; didn't seem to be bruised parts between them; nothing more than the scalp was br oken.

Q. You do not mean by that a cut wound like it had been cut with a knife? It wasn't that sort of a wound?

A. No, sir. It didn't have the appearance as though it was cut with a knife; its edges were rough.

Q. Was the skin cut in three different places?

A. Yes, sir; it was cut in three different places. The skin was broken to the bone in three different places.

Q. On top of his head?

A. Yes, sir; about the head.

Q. You say there was one wound here?

A. Yes, sir; it was just a slight wound; I could not tell how it was done.

Q. You say there was a cut here on his neck?

A. Yes, sir.

Q. You say his throat was cut; was it cut, or just a cut across the neck?

A. It was as though the knife had been stuck straight*n* in on the side of his neck here, and then cut out, probably an inch and a half long.

Q. You speak of his throat being cut; you do not mean that; you simply mean there was a cut on the neck?

A. There was a cut on the neck here.

Q. Windpipe, throat, or anything else cut; you don't know anything about that?

A. No, sir.

Q. When you say his throat was cut, you mean his neck was cut?

A. Yes, sir; I mean that he was cut on the side of the neck or throat.

Q. How wide was that wound?

A. Probably an inch and a half.

Q. Those are the only wounds you saw?

A. Yes, sir.

Q. You helped to dress the men?

A. Yes, sir.

29 Q. State to the jury if there were any wounds on the back of the heads of either of these two men.

A. If there were I never saw them.

Q. You helped dress them, and you saw the men; now tell the jury whether there were any wounds on the back of the head of either one of them.

A. I didn't see any wounds on the backs of the heads of either one of them; no wounds only the wounds I have described.

Q. You say you saw some blood and hair on a stick near the fire?

A. Yes, sir; there was blood on a chunk that was by the fire; a piece of wood had been put on the fire and burned off; just the end of it laid out there.

Q. What sort of wood was this that was around that fire?

A. I could not say, for I never took any notice.

Q. Had it been chopped or picked up, or how?

A. It had been chopped.

Q. Did you see any evidence of any wood having been cut there near the camp?

A. I didn't notice any; I never loooed for any.

Q. But you did notice that the wood of which the fire had been built had been chopped?

A. Yes, sir; that piece had been chopped, I know.

Q. You say there was a pan on the fire with a rock in it?

A. Yes, sir.

Q. Tell the jury what size rock that was.

A. It was a small rock; would weigh probably four pounds.

Q. It was in a pan; frying pan?

A. No; I guess it would be called a small dish pan.

30 Q. And it was sitting on the fire, or near the fire?

A. It was setting on the fire, on the coals, what was remaining of the fire.

Q. Was there anything else in it but the rock?

A. No, sir.

Q. Now, you say there was a pan that seemed to have dough or something in it; no, you did not state that?

A. No, sir; I did not say anyting about that.

Q. You did not see anything of that?

A. No, sir; not at that time, I didn't.

Q. Did you when you went down that morning see anything of a pan there with dough in it?

A. No, sir; I didn't.

Q. Did you look around the camp that morning?

A. No, sir; we looked right around the fire, but we wasn't there more than a minute and a half or two minutes until we left.

Q. When you first went there you saw the blood on the stick, and this hair there, and you saw a trail of blood; what do you mean by that?

A. Saw where they were dragged to the creek; there was a pool of blood right by the fire; some six or eight feet from there, further on, we saw more blood a little further on there was a tree, and there was more blood around it.

Q. I want to get at that. There was a little blood at the fire?

A. Yes, sir; there was considerable blood around the fire.

Q. About eight feet from there more blood?

A. Yes, sir.

Q. Some further on, near a tree, there was more blood?

A. Yes, sir.

Q. Tell us how near that tree was to that blood.

A. There was some blood on the roots of the tree.

Q. I want to know the distance from that tree to where the most blood was seen? From the blood on the tree to the blood.

31 A. It isn't over eight or ten steps anyway to the bluff from the tree.

Q. Is it in the direction of the bluff from the fire?

A. It is nearly a direct line from the bluff to the fire.

Q. Was it nearer the bluff than the fire?

A. I could not say whether it was or not.

Q. Anyway, that tree is near the bluff?

A. Yes, sir.

Q. There is where you saw the principal blood?

A. No, sir; there was more blood close to the fire than there was at the tree.

Q. You mean by that that the additional blood was at the tree between the two places?

A. Yes, sir.

Q. You speak of being dragged out there; what do you mean by that? A trail like you would drag a hog; looked like that?

A. It looked like as though the leaves had been displaced, as though something had been dragged.

Q. Had something been dragged, or could you tell whether something had been dragged along there and torn the leaves up?

A. It looked as though they had been dragged, because they were moved all along; stepping, one would move part of them, it looks like.

Q. Was there one or two trails?

A. There was two.

Q. You know whether something had been dragged through the leaves, or whether they were 'nocked up as though somebody had been walking?

A. Yes; they looked as though they had been dragged.

Q. Could you tell distinctly if a man had been dragged along there, would it not pull the leaves all up?

A. No, sir; there wasn't many leaves there; just scattering leaves.

Q. There was dirt?

A. Yes, but it was frozen.

32 Q. It would have been easier to tell positive about it in the dirt than in the leaves.

The DISTRICT ATTORNEY. He says it was frozen.

Mr. HODGES (of counsel for defendant). Hard?

A. Hard enough to bear up a wagon or team.

Q. This was on the 26th of December?

A. Yes, sir.

Q. The ground was hard enough to bear up a team?

A. Yes, sir.

Q. And your judgment was it had been dragged there?

A. Yes, sir.

Q. You say it wasn't plain to be seen?

A. No, sir; I did not notice it plainly. I didn't stop long enough to notice anything. Just seen the bodies, and went on.

Q. You were with the first that went there to examine, were you not?

A. Yes, sir; well, I wasn't with the first that went to examine.

Q. But you went back there with the parties that went back to the bodies after you found them?

A. Yes, sir; I went back to find out whether they were dead or not.

Q. Did you see any cooking utensils, or anything of the kind about this fire there, the time you saw this pan?

A. No, sir.

Q. In trailing this blood, did you try to follow the trail of blood?

A. I didn't try it at all; just followed the course of it out to the bank.

Q. As far as you are able to state to the jury, there was not only one trail of blood? Isn't that a fact?

A. I could not say whether there was more than one or not; there was blood scattered all along there

Q. You can not testify but to the one trail of blood; you were
33 there and examined, and saw the blood at the tree and the fire?

A. I made no examination of it, any more than to go out there wher' the bodies were, and I went on to town.

Q. You have dun stated to me you saw two apparent trails where they had been dragged; did you see blood any more than that? That is what I want to know; you said you saw blood at three places.

A. There was blood at the fire, and there was a puddle of blood between the fire and tree, and there was blood at the tree.

Q. And that is the blood you noticed?

A. Yes, sir.

34 W. G. BAERD, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. William H. H. Clayton, and testified as follows, to wit:

Question. Please state where you live?

Answer. In the Choctaw Nation.

Q. How far from Wilburton?

A. About four miles and a half.

Q. In what direction from Wilburn?

A. West.

Q. Do you know the place where the dead bodies of the two dead men, Vandevere and Bolding, were said to have been found?

A. Yes, sir.

Q. How far do you live from there?

A. It is about one mile, probably a little more.

Q. Were you present when this diagram was made?

A. I was in your office.

Q. Do you know enough about the country to explain it?

A. I believe I do, sir; I paid no particular attention to it.

Q. (Witness is shown diagram.) Please state if this substantially locates the Choctaw Railway Company.

A. Yes, sir.

(Witness here points out and names the different roads in that section of the country, and explains their situation with reference to the dead bodies, after which the map is shown to the jury and explained by counsel.)

Q. Please state if you were at home on Christmas day of last year.

A. I was.

Q. State if upon that day you saw this defendant.

A. Yes, sir; I did.

Q. Please state where, at what time, and under what circumstances you saw him.

A. On Christmas day last, the 25th of December, in the afternoon, Mr. Freeny and myself were setting in the room talking, and there was a step on the porch, and at my door a rap; I thought it was some of the neighbors; the door was a little hard to open, and I just remarked, "Come around to the other door." As they walked across the porch I thought I did not recognize the step; I got up, however, to meet them at the door that leads into the hall of my house, and I saw a young man there I took to be a tramp. He spoke some and acted as though he wanted to come in, and I invited him in, and he came in and set down and talked a few minutes; wanted work, and I told him that he could get work at Wilburton, in all probability.

Q. Who was that?

A. I didn't know his name then; I learned afterwards that his name was John Brown.

Mr. HODGES (of counsel for the defendant). I thought he was talking about the defendant.

The DISTRICT ATTORNEY. He will in a minute. (To witness.) Go ahead.

A. I told him he could get work, in all probability, at Wilburton, and I came out in my porch, and walked to the end of my porch, the north end, and pointed to him, and said, "If you will go right straight across the prairie—"

Mr. HODGES (of counsel for defendant). What occur'ed there between this witness and John Brown has nothing to do with this case.

The DISTRICT ATTORNEY. It does not affect the case one way or the other. (To witness.) Go ahead.

A. I said, "If you go right straight across the prairie you will
36 strike the road taking you to Wilburton;" and as he walked away a wagon drove up in front of my house and stopped. I turned in a moment and started back into the room, when I saw this young man coming towards the house.

Q. Where was the wagon?

A. It stopped out in front of my house. I saw him walking toward the house and I turned and went out to meet him, believing that he wanted some information of some kind, and he walked up to me and got in 5, 6, or 7 steps of me.

Q. You are speaking of the defendant?

A. Yes, sir; he put his hands on the palings and spoke to me very pleasantly, and asked me if I had any hay to sell, and I told him that I did not care to sell any, and remarked to him, "Are you going down the road further?" and he said he was, and I said, "About a mile further you can get some hay."

Q. At whose place?

A. I don't know that I told him whose place; I told him down the road. I told him the roads forked, and for him to take the left-hand road when he got out on the hill, and he would see the house to his right and across the railroad. It is where Mr. Feleer lives.

Q. That is the place you directed him to?

A. Yes, sir; and he thanked me and turned to walk away. As he walked away I noticed him until he got back to the wagon. I had, however, noticed the wagon while I was talking to him, because he was standing almost directly between me and the wagon, and I noticed a young man standing at the back end of the wagon.

Q. At the hind end?

A. Yes, sir.

Q. Did you see anybody in the wagon?

37 A. No, sir; the wagon was in such a position I could not see anybody under the sheet, could not see who was in there; apparently he said something to this young man behind the wagon, and in a moment or such a matter, maybe less time, the wagon moved off.

Q. Did the defendant get in the wagon?

A. No, sir; as the wagon moved off this gentlemen here (the defendant) and the man standing behind the wagon started off afoot.

Q. Could you tell whether there was anybody in the wagon or not?

A. From the position of the lines I felt like maybe there was another in the wagon; it pulled around into the road, and I became satisfied there was some person driving; however, I did not see him.

Q. Describe as near as you can the team and harness and ever'thing you noticed about it?

A. It was a bay team, what I called the nigh horse, the horse working on the right-hand side going that way was a bay horse with a white spot in his face; the other was a light bay. The sheet looked to be new, new-looking harness; I was too far off to pay any attention; I would not be noticing it, I suppose, but there was some oilcloths over the *heim* used for housen, which made it attractive.

Q. You noticed that?

A. Yes, sir.

Q. What time of day was that on Christmas?

A. It was between 4:00 and 5:00 o'clock in the afternoon.

Q. Of last Christmas?

A. Yes, sir.

Q. Please state when and from whom you received the first information with regard to any persons being killed down there, if you received such information.

A. After dinner on the 26th, Saturday the following day, be-
38 tween 1:00 and 2:00 o'clock, I guess; a young fellow by the name of James Langhlin came to my house——

Q. You need not state the conversation, but if he informed you of the fact there was some dead bodies down there you may state that.

A. Yes, sir; he came there and remarked to me there had been a couple of dead men found in the branch below my house, and asked me to go down and see if I knew who they were and see if I knew anything about it, and he addressed his conversation to Mr. Freeney, I suppose, as much as to me.

Q. You got the information from him?

A. Yes, sir.

Q. Please state if you went.

A. Yes, sir; I went with him.

Q. Who went with you?

A. Mr. Freeney.

Q. You and he went together?

A. Yes, sir.

Q. Did you find anybody there when you got there?

A. Yes, sir.

Q. Who did you find there?

A. I found two dead bodies; I didn't know, of course, who they were at that time; I have since learned that one of them was Vandevere and the other was Bolding.

Q. Did you find anybody else—any live persons?

A. Yes, sir; there was quite a number of men that had collected there.

Q. Did you examine these dead bodies of these two men and ascertain whether there were any wounds upon them?

A. Yes, sir; I did.

Q. Describe the two dead man as near as you can?

A. One man was a cripple, he was about 5 feet five inches, along there somewhere; he was what I would call fair complexion, dark hair, dark red mustache, very dark red; had whiskers here on his chin of about two weeks' growth, I should judge.

Q. Beard, instead of whiskers?

A. Yes, sir; he had on a black coat, wool coat. He had on a dark
39 wool shirt with yellow stripes in it; some stripes were darker than the others. He had on for an undershirt what I would call a cotton-flannel overshirt. He had on a dark pair of worsted or woolen pants, with a light stripe or thread running up and down in them. He had on a pair of congress gaiter shoes; didn't seem like they had been worn a great deal; been worn some of course. The toe of the left shoe looked as though it had been used to walk on more than the heel; the heel of the shoe was not apparently worn.

Q. Please state if that shoe was on the side that was crippled, or on the other side?

A. That was the crippled side. Under the arm of the coat here it was worn, and I supposed, of course, it was worn with a crutch; anyhow it was worn. We judged him to be about 30 years old. We got off of his person a French harp and an old pocketknife, the handle on one side being gone, and only about half of the handle on the other side there. The small blade was there, and a piece of paper. That is what we got off of him, and we also got a white pocket handkerchief out of his pocket, which we tied over his jaws to hold them together. I believe that is all we got.

Q. State how you know this man was crippled.

A. I would say that this examination was not on that day; when I took the written examination, or written description; it was on Sunday.

Q. Have you that written description with you?

A. No, sir; I forgot it; left it at home. At the time we took that description we didn't know who they were, and the object was to try to find out who they were. We moved the bodies out of the bed of the branch up on the bank, and laid them down and washed their faces, and I
40 examined them, and I noticed that his leg was drawn in that manner [indicating], and I pulled off his shoe and his sock, and pushed his pant leg up above his knee, and I noticed that the flesh was perished away, and his ankle it might have been its right size; anyhow it was a little larger there; the rest of it apparently was skin and bone.

The COURT. From the ankle up to the knee?

A. Yes, sir. Of course when I would go to straighten the leg it would naturally come back in that position.

Q. (By the DISTRICT ATTORNEY). Now, you may describe the wounds upon that body, if there were any.

A. He had a gash on his head, struck him a little to the left of the center of his head, commencing about here [indicating] and went to about here [indicating]. There was a smooth cut as if it had been done with an axe.

Q. Commencing on the left side?

A. Yes, sir; about here where my finger is on my head.

Q. Did it cut his forehead or commence back of the hair?

A. It commenced right here [indicating]. That was just a smooth cut clear in; I noticed that the top of the head of skull here you could see the edge of the bone along here; it hadn't come back, you know; we could not get it back so it was even; just a smooth cut as though one lick had done it.

Q. Were there any other wounds?

A. None that I saw.

Q. Any where upon that body except that wound?

A. That is the only wound I saw upon him.

Q. Describe the other man.

A. The other man was a young man, apparently about 20 years old, 19 or 20; he was smooth faced.

Q. Any beard?

A. No, sir. He was five feet eight inches, I believe.

41 Q. Did you measure them?

A. I didn't do it myself, but I gave my rule to a gentleman who went and cut a stick and measured them and then measured the stick.

Q. You were present when it was done?

A. Yes, sir.

Q. Go ahead.

A. He had on what I would call a brown, yellowish coat and vest that had been worn a great deal, and strips in it platted, and he had on a shirt, deep blue, with a white stripe in it. He had on a dark pair of cotton pants, they had a black colored stripe in them, and he had on a pair of overalls, brown ducking overalls. I would also state that the other man had on a pair of brown ducking overalls. This boy had on a pair of heavy coarse high-cut shoes, thick soles, and cotton socks.

Q. Please state if his shoes were tied?

A. They were string shoes not tied up.

Q. Untied?

A. Yes, sir; I believe that was the way he was dressed, as I have described.

Q. Please state if there were any wounds upon the body of that man?

A. I got some things from his person, too.

Q. What did you get from his person?

A. I got a pocket knife; it had been a four-bladed knife, but the two small blades were broken out, and a pocket comb, short pocket comb, brass back. We took a cartridge belt from around his body; also took a white cotton pocket handkerchief out of his pocket, which we used to tie around his jaws.

Q. Please look at these things and state if they are the *the* things you took from his body?

A. Yes, sir.

Q. You may describe the wounds.

A. We found a bruised place on this young man's head, right about there, somewhere on the forehead [indicating].

42 Q. Describe that wound as to appearance?

A. It had been done with some heavy blunt instrument of some kind.

Q. Was the skull broken, or just bruised?

A. I never felt of the skull to see whether it was broken or not; it looked like a bruise to me. There was a gash on his head along about there [indicating] somewhere. There was another gash here that extended down from about there [indicating].

Q. Extended from the forehead nearly to the nose?

A. Yes, sir; there was another gash on his head, along about here [indicating on forehead]. There was a wound, I would not be positive whether it was on the right of left side of the nose, but I think it was to the left, just cut there, and we found a wound on the right-hand side of his neck, just about the collar bone here.

Q. Describe that wound.

A. It was a wound about 2 inches long, I suppose; I did not probe it to see what depth it was. I was satisfied it cut the jugular vein.

Q. Was there any blood around there?

A. Yes, sir; there was blood on his clothing.

Q. Please state if the skull was broken or not.

A. Yes, sir; this wound here, there was brains, kind of blood froth had settled around there.

Q. Had all three of these cuts gone through the skull, or just one of them?

A. I would not be positive about all three of them; I am satisfied that two of them did though.

Q. Describe the place where these men were when you first went there?

A. They were lying in the bed of the creek.

Q. Describe the creek there, the banks.

43 A. Well, on the side of the creek there next to where the camp had been—that is, on the east side of the bank; the bank was somewhere between 6 and 7 feet high, I would judge.

Q. The bluff bank?

A. Yes, sir; right straight up and down. On the west side of the branch there was no bank at all.

Q. No bluff?

A. Kind of slanted, like that [indicating].

Q. How wide was the creek there from bank to bank?

A. Perhaps eight or ten feet.

Q. In what direction were the heads of these two men?

A. Laying west.

Q. Where were the feet?

A. East.

Q. Towards the bluff bank?

A. Yes, sir.

Q. Were both of their feet and heads lying in the same direction?

A. Yes, sir; they were both laying about in the same direction.

Q. How close together?

A. Well, they were laying right close together. The young man was laying on his back, with his head in that shape [indicating] and his arm out in that manner, and the crippled man was laying to his right, and had his leg just over the hand of the young man, the older one of the two; or the crippled one, his head might possible have been a little further south than west, but they were both lying with their heads in that general direction.

Q. It was the crippled man that was laying upon the other's hand, the young man's hand?

A. Yes, sir; I don't think the leg was right down on the hand; it was kind of that way [indicating], but still the young man's hand was under the leg, like that, you know.

44 Q. You speak of a camp being there; whereabouts was that camp, with relation to the bodies; on which side of the creek?

A. The camp was on the east side.

Q. How far from the place where the bodies were found?

A. From the fire to where the body lay was about 18 or 19 steps.

Q. Go on and describe everything you found in and around that camp-fire.

A. Right close to the fire and on the west side of it was a pool of blood and brains——

Q. The west side is between the fire and the creek?

A. Yes, sir.

Q. How close to it?

A. I don't think it was more than five or six feet; along there somewhere. There was a pool of blood there and some brains—what we took

to be brains, at least—and some dough flour. Well, then, about 8 or 9 steps from there there was a red oak or black oak tree. From the camp fire back to this tree it was 8 or 9 of my steps, from the camp fire towards where the bodies lay in the creek. Around that tree there, two feet and a half or three feet, there at that tree, on the west side of i', there was blood and then about five or six feet of the tree there was a pool of blood.

Q. Which direction?

A. It was west of the tree, still towards where the bodies were. Well, then, about 6 or 8 feet above there was still another pool of blood, and maybe a little bit south, not on a direct line, the ground, from where the last pool of blood was, looked as though there had been something dragged through the leaves—went right to the creek bank. I supposed, of course, it was one of the bodies dragged and thrown over, and, then, from this pool of blood, near the fire, there was another mark over the
45 leaves and ground; had the appearance of a man being dragged and dragged right straight on to the creek bank, one of the bodies, as these marks showed.

Q. Please state what else you observed, if anything. Did you find anything around there?

A. There was a bread pan or dish pan off about 40 yards from the fire and there was a large spoon lying—I never measured the distance, but I suppose someway near half way between there the pan was and the fire.

Q. Which one of these pans I have here was it?

A. The pan you have now in your hand.

Q. Is the spoon I now have in my hand the spoon?

A. Yes, sir.

Q. The pan now has the appearance of having had dough in it?

A. Yes, sir; when I got it there was some on the side of it; it has dried and fallen out.

Q. Where was that pan?

A. It was lying about 40 steps from the fire in a southeast direction, I suppose you would call it.

Q. Do you remember to have seen this pan [referring to another pan than the one spoken of above]?

A. Yes, sir; when I saw that pan it was setting right by the fire.

Mr. HODGES (of counsel for defendant). We do not deny that were found there.

The DISTRICT ATTORNEY. These things we have proven; we will now formally introduce them in evidence.

Mr. HODGES (of counsel for defendant). Yes, sir; consider them all introduced.

The DISTRICT ATTORNEY. How far and in what direction was the first pan?

A. A southeast course from the fire; the largest pan. About 40 yards, I guess, from the fire.

46 Q. That is all wood land in there is it not?

A. Yes, sir; it was timber there; it is open timber.

Q. Please state if you found anything else? Were you present when the ashes of the fire were examined?

A. No, sir.

Q. You know nothing about that?

A. No, sir.

Q. Please state if you noticed any place where a team and wagon had been?

A. Yes, sir.

Q. Where was that?

A. Well, the team was on the east side of the fire, I will say 12 or 15 feet from it.

Q. Directly east, or a little north of east?

A. A very little north of east.

Q. The place where the team had been?

A. Yes, sir; there was evidence of a team having stood there, because there was some evidence of hay left there, and then where the horses had stood.

Q. Did you trace out the wagon tracks any?

A. No, sir.

Q. Were you present when any weapons, or the axe, or anything were found?

A. No, sir; I was not very well that day, and I sent my son and a young man that worked for me—the axe was turned over to me the day it was found by the young man that found it.

Q. What did you do with it after that?

A. I took care of it, and on the first day of February last when I was down before the grand jury here I brought it here and turned it over to you.

Q. Is the axe you turned over to me?

A. Yes, sir.

Q. It is in the same condition that it was then?

A. Yes, sir; I believe it is.

Q. Was that eye broken out of it?

A. Yes, sir.

Q. Who turned it over to you?

A. William Snow, a young man that works at my house.

47 Q. Is he here?

A. Yes, sir. I brought a broken bracelet at the same time.

Q. You were not present when that was found?

A. No, sir; I brought that and that iron rod.

Q. Are these the things that I now show you?

A. Yes, sir.

Q. Who did you get them from?

A. A man by the name of——

Q. Did he give it to you at the place?

A. He brought it to my house.

Q. All of them?

A. No, sir; not all of them; some of the other boys gave me some of these things.

Q. Were these men you speak of white men, or were they Indians?

A. They were apparently white men.

Q. The defendant has the appearance of being a white man?

A. Yes, sir.

Cross-examination by Mr. J. C. HODGES:

Question. You say it was about 18 or 19 steps from the fireplace to where the bodies lay?

Answer. Yes, sir.

Q. The bodies lay west of the fire?

A. Yes, sir.

Q. You say things had the appearance as if one man had been dragged from near the fire to the bluff; I want to get what you said about the other?

A. A. In about 6 or 8 feet there was a pool of blood, and it seemed as if some one had been dragged from that pool of blood over the bank.

Q. Were you there with the first parties?

A. There was quite a number of parties collected there when I
48 got there, but I was told that the bodies were in exactly the same place they were when they were found.

Q. What kind of blood was it there where it seemed this party had been dragged from near the bank and put over?

A. Oh, well, I could not tell what kind of blood it was; there was considerable blood.

Q. I want to ask you if there were any wounds that indicated any lick across, or if they were all wounds as if they were struck straight that way or very near so?

A. From the location of these wounds they were not across the back of the head, but they seemed to be struck straight.

Q. Were they?

A. Apparently they were.

Q. Had they been done with the blade of the axe or the back of it?

A. It was done with the blade of the axe, I think.

The COURT. I wish you would ask the witness in that connection if he examined as to the depth of that wound, whether it went through or not.

The DISTRICT ATTORNEY. He has said that the skull would not come together; it seemed to be ragged.

Mr. HODGES (of counsel for defendant). The wound from here somewhere, and run back; looked like the whole blade of the axe had been sank into his head?

A. Yes, sir.

Q. Could you tell how deep that wound had gone, from the appearance?

A. I never, of course, probed it, anything like that, but from all appearances the axe had went clear to the hilt; that was the impression on my mind when I examined it.

The COURT. Went into the brain, you think?

A. Yes, sir.

Mr. HODGES (of counsel for defendant). This is the crippled man?

A. Yes, sir.

49 Q. Your judgment from an examination of the wounds was that there had been an axe struck and stuck into his head?

A. Yes, sir.

Q. You saw no other wounds on him?

A. No, sir.

Q. You are not a physician?

A. No, sir.

Q. You could not give an idea of how a man would probably bleed struck in the head that way?

A. No, sir; I would not attempt to do anything of the kind. Of course, the other man was wounded in other places on the head besides the one here; he had a bruised place right about there; just to the right of the front of the forehead here, I noticed a bruised place.

Q. You say that bruised place looked as if it had been done with some blunt instrument; that did not appear to have been done with an axe?

A. I could not say, of course.

Q. It seemed to be bruised, to say the l'ast of it?

A. Yes, sir; there was a bruise there; no question about it.

Q. There was no skull broken there, was there?

A. Not that I know of; I didn't press on it to see.

Q. Then the other wounds on the head of the young man that you describe, were they made with the blade of the axe or with the back of it, apparently?

A. They were made with the blade of it.

Redirect examination by the DISTRICT ATTORNEY:

Q. Did that wound in his neck go through his clothing?

A. I think not.

Q. It was above his clothing?

A. Yes, sir; as he was laying the wound was covered up, and we
50 didn't see it until we brought them up on top of the bank.

The COURT. You said awhile ago, in answer to the district attorney, that you were satisfied that that wound in the neck cut the jugular vein.

A. Yes, sir.

Q. Why do you think so?

A. Because the jugular vein is there, and it was a great, gaping wound.

Q. You thought it was deep enough to reach the vein?

A. Yes, sir; I did not probe it, but the wound was fully that long (indicating). A gaping wound, I should say, anyhow.

Q. That is about an inch?

A. Yes, sir. There was a gentleman there that did probe it; I didn't.

Q. Did you see him do it?

A. I saw him stick his fingers into it; the sight was so that I did not want to look at it.

Q. Could this wound on the front of the head you speak of be made with the pole of an axe?

A. That was my judgment about it.

Q. In examining that lame man's leg, did you examine it above the knee?

A. Yes, sir; pushed his pants up above his knee about that far.

Q. What was the condition of the flesh above the knee?

A. It was perished away a little; not quite so bad as it was below.

51 HARVEY C. FLIPPO, having been duly sworn upon behalf of the Government, was examined by the district attorney, William H. H. Clayton, and testified as follows, to wit:

Question. State your name.

Answer. Harvey C. Flippo.

Q. Where did you live at the time these two men's dead bodies were found up there near Wilburton?

A. We were camped there at that time, not very far from Wilburton. I was living at that time about three miles and a half—maybe a little more than that—west of Wilburton.

Q. How far from where the dead bodies were found?

A. As near as I could tell, about between 2 and 300 yards.

Q. In what direction?

A. A little bit south, or maybe a southeast course.

Q. You were present when this map was drawn, were you not?

A. Yes, sir.

Q. Your place, as located on the map, is about correct?

A. Yes, sir.

Q. Please state if you learned of the bodies being there; and if so, from 'him and when.

A. On Christmas night there was some parties at my place; they were men I don't have any dealings with; there was a dance going on that night, and the next morning—I should judge it was somewhere close on to 11:00 o'clock—when Mr. Simon came to my place and told me there was a couple of men, either dead or dead drunk, laying down in the creek—the body of the creek.

Q. The Mr. Symon you speak of is the witness here?

A. Yes, sir; and he wanted me to go down there with him, and I went.

52 Q. What did you find?

A. When I got down there the first thing I seen was a campfire, and we went on to the bank and we seen a couple of men, and they were dead, and there was blood on the bank; I went back to the fire then, and there was blood there, right close around the fire, off a little ways. I went down to Wilburton and made a report of it.

Q. Did Mr. Simons go with you?

A. Yes, sir; there was a man named Neal went with me.

Q. Is Neal here?

A. No, sir.

Q. He lived with Mr. Simons?

A. Yes, sir.

Q. You were camped?

A. Yes, sir.

Q. Camped in the edge of the woods?

A. Yes, sir.

Q. When you went to town and came out who came with you?

A. There was a man named Joe Petit, and Mr. Adamson, and there was others, but these was in the wagon I came in. In the meantime Mr. Jack Flippo got in with us.

Q. He is here?

A. Yes, sir; he lived right out at the hay camp, but he lived across on the other side of the road. There was several wagons came out; who all was there I can not remember. We got to examining there, and there at the end of the fire there was blood; where the fire had been built the night before.

Q. Where did you find the blood?

A. There at the edge of the fire.

Q. How far from that fire; how far was that fire from the bank over which the bodies had been thrown?

A. Somewheres between 17 and 18 steps; somewheres near about 50 or 51 feet, as near as I could get at it. The fire was east of the bodies.

Q. Near the fire you say you found some blood?

53 A. Yes, sir; then on out I found some more blood; between there and where the bodies were lying.

Q. How far?

A. I don't know hardly how far that was; I never stepped it. Then beyond there there was a tree standing about halfway between the fire and the bank where these people were thrown over the embankment, and there was blood there. There was blood from the root of the tree up for four feet or five on that tree, as though there had been a struggle made around the tree.

Q. That was a big tree?

A. Yes, sie; and beyond that still towards the bodies there was a puddle of blood.

Q. How close was that other sign?

A. That was probably close on to 6 feet to the left of the body, where it had been supposed to be dragged.

Q. Did you see the dragged place?

A. Yes, sir; there was a drag from that place to the embankment of the creek.

Q. Where were the bodies with regard to the embankment?

A. They were just the same as if I would drag something over on this platform and heave it ober into the bed of the creek.

Q. Did you observe any other drag except that short drag?

A. No, sir; I did not, only the drag made right along there.

Q. What else did you observe?

A. There was a great many people there and we got to looking around, and we found where there was a wagon standing.

Q. Were you there when the pan was found?

A. Yes, sir.

Q. You have not mentioned that?

A. That pan was setting on the top of the fire with a rock in it.

Q. Where was the other pan?

54 A. That was setting somewheres in towards the direction of my camp; somewheres in that neighborhood, and probably 30 or 40; maybe it wasn't more than 20; somewheres along there, between 25 and 30 steps from the fire, or maybe forty.

Q. Where was that spoon?

A. Laying about halfway between the fire in the same direction of the pan.

Q. Please state if there was any examination made among the ashes in the fire.

A. Yes, sir; a man named Petit picked out of the ashes the rim of a pocket book.

Q. Is this it?

A. Yes, sir; if that is not it it is one that looks just like it.

Q. Was it in that condition?

A. Yes, sir.

Q. That was taken from the fire?

A. Yes, sir; and I said to Mr. Petit when he took it out, "Let everything lay until we get an officer here." There was no officer on the ground, and we had telegraphed for a man living at Red Oak—a notary public up there by the name of Nash—and I told him to leave them lay. While we were looking around some one went to work and scratched these things out, and there was a little peice of a rim, iron band, some kind of a little peice of brass or copper; I don't know what.

Q. Look at this; is that it?

A. Yes, sir.

Q. What else did you find?

A. A little rod about that long.

Q. Is this it?

A. Yes, sir; or one just like it.

Q. Did you find anything else?

A. That is all I know of being found in the fire.

Q. Was there anything else found around there?

A. Yes, sir; there was a bracelet found some four or five days afterwards. That was all that was found at that time.

55 The DISTRICT ATTORNEY. I will introduce the things this witness has identified to the jury.

Q. Were you present when the bodies were examined?

A. No, sir; I wasn't.

Q. Did you find a wagon track there?

A. Yes, sir.

Q. Where did you find that?

A JUROR. You said you lived close to the camp. Did you hear any hollering that night of the killing like anybody being murdered?

A. No, sir; I did not.

The DISTRICT ATTORNEY. You heard nothing?

A. No, sir; that is, no hollering at all.

Q. You may now state about the wagon tracks.

A. The first place where we discovered there was a team was standing was right close to the fire; north probably two or three steps from the fire.

Q. North, or a little northeast?

A. A little north of east. We couldn't track any rack out of there at that time; we tried. We went to work and we found where they had turned out and came in. It was frozen that night. It was terrible cold night; everything was frozen. Where the wagon came in it left very nice wagon tracks the evening before; that is, on Christmas evening, where the wagon tracks were made beyond doubt.

Q. Why do you say beyond doubt?

A. It was made there that day because there was nobody in there on Christmas day; that is, that I know of, because I was down there.

Q. Did you see where the wagon track went out?

A. We went to work, and we could merely find where it had

56 crossed; it went right back in the road, the track going west, or a little south of west, towards Mr. Beard's, on the same direction it came in there, and it tuened after it crossed the creek and turned to the

right, and it bore to the right and then it circled around; it made several wagon tracks, came around in by a little field, turned, and struck out for the McAlester road; it crossed the main Stringtown road and went into the McAlester road.

Q. You were present when this diagram was made?

A. Yes, sir.

Q. Is the mark indicated here with a red line about the route you followed?

A. Yes, sir.

Q. Did you trace it out into the Hartshorne road?

A. Yes, sir; three of us.

Q. What three were they?

A. One was Mr. Adamson, and myself, and a man named Randolph.

Q. Wasn't Mr. Neal along with you?

A. If he was, I don't remember it.

Q. Didn't he go to McAlester with you?

A. Yes, sir.

Q. Where did he get with you?

A. On the ground after I went home after my horse.

Q. Go on and state what you done.

A. When we traced it to the Hartshorne road we turned around and came back to the camp where the dead men were lying. Mr. Adamson said, "We are burning daylight; somebody ought to go in pursuit;" and I said, "I am ready;" and a man by the name of Neal said, "I will go, but I have got no horse;" and I said, "I am in the same fix, but I will go up to the house and get one." And I went back to the camp and got a horse. Mr. Petit, the man that came out with me from Wilburton, he said, "I am here with a wagon and team," and that we could have
57 his horse, and got a saddle from another fellow there, and we started in pursuit.

Q. Who started?

A. I and Mr. Neal, together.

Q. Did you arm yourself?

A. Yes, sir; I had a gun.

Q. You started horseback?

A. Yes, sir.

Q. This was the 26th?

A. Yes, sir.

Q. What time did you leave there?

A. We left there somewheres between 4:00 and 5:00 in the evening.

Q. Now, then, go on and tell how far you went that evening.

A. We started on and went on up by the section house, and after we left the camp there was an Indian boy came to us, and he said he back-tracked this outfit to Mr. Beard's. That is the first time I knew anything about that Indian boy being on a back-track. I can not think of his name, now. I said, "What did you find out?" And he said there was a wagon passed Mr. Beard's late yesterday evening with a pair of bay horses, and he said on the heim's was oil cloth housen.

Mr. HODGES (of counsel for defendant). This conversation takes up a great deal of time.

The DISTRICT ATTORNEY. You got a description of the team from the Indian boy?

A. Yes, sir.

Q. Now, then, what did you do?

A. We went on out somewheres, I suppose in the neighborhood of two or three miles, to a man named Johnnie, Dentons.

Q. How far did he live from Hartshorne?

A. He lives about 10 or 12 miles; and we asked him if he had noticed any wagon pass there that morning, and he said he seen a wagon on the Hartshorne road; and we went back to the Hartshorne road and we
58 went on. We could not find where that wagon had went out; every once in a while I would notice horse tracks, or some kind of tracks, and after a while we went out to No. 3 shaft.

Q. Where is that; how far from the road?

A. It is on the north side of the railroad; I could not tell you the exact distance from the main line. When we got there we met him coming, and inquired about the team, and he gave us a description of the team and a description of the man, and we had a talk with him on back going up the hill.

Q. You had gotten a description?

A. Yes, sir; from the Indian; and he described the same team.

Q. Go on; what did you do?

A. We pursued right on, and got to a house, and it was night, and we made inquiry there of a team, and we were given a description.

Q. Of the same team?

A. Yes, sir; described the same kind of a team. And we went on into Hartshorne that night. We woke some parties and asked them if there had been such a team pass, and they gave us a description, just at the edge of Hartshorne, about a mile from Hartshorne, that a team should have been along there somewhere between 11 and 12:00 o'clock that day. We went into Hartshonre and inquired around, and we could not trace the team any further that night.

Q. What time did you get into Hartshorne?

A. I could not tell exactly what time it was, but somewheres, I guess, between 10:00 and 11:00 o'clock; I don't know; I could not say. We got up next morning, and we started out again.

Q. Please state if you found the track again.

Q. After circling around Hartshorne, going around these strip pits to see whether a man wanted work or not, we found that this team
59 that we were on pursuit of, a team of the same description, had stopped and left his team there and went back in town at dinner time.

Q. Whose house was that?

A. A nigger woman by the name of Minnie Jones.

Q. Pass on from there.

A. We got no further information until we got into Alderson.

Q. How far is Alderson from Hartshorne?

A. I could not tell.

Q. You were going on towards McAlester?

A. Yes, sir.

Q. Did you get any information at Alderson?

A. We got a description of the team.

Q. Same team?

A. Yes, sir; by two different parties, a description of the same team we were on pursuit of. This colored oilcloth had attracted attention all the way along; that was the thing we were travelling by. We went on and got to Krebbs, and got through Krebbs, but we couldn't get any track, and we did not know whether we were on the right track or not, and we went on to Old Town before we got to South Town. We got feed for our horses there, and we asked if we could get some dinner at the house. We started over to the stable and made some inquiry if they had seen any sort of a description of the team, you know, and one fellow said there was a team went into the stable there last night at McAlester, old town. I said, "If that is the team I am on pursuit of, I think I can find it if it is here." I went in there, and when I got into the stable I got to looking around, and seen the harness hung up, and I seen this oilcloth there, and I made up my mind that that was the harness and the horses, and the next question where the man was that owned that team.

Q. Was that old McAlester or South McAlester?

A. Old McAlester; old town. I made some inquiries around about the stable, and they said he was trying to sell the outfit; they said he was in the wagon. I went to the wagon and pushed up the sheet: the sheet was all tied down; and I went to the hind part of the wagon, where I could see in, and there was a man standing on the tongue with his shoulders into the wagon.

Q. Who was that?

A. I don't know.

Q. Do you know what nationality he was; could you tell whether he was foreigner?

A. No, sir; I could not say, because I never seen the man's face, and I seen a man in there, and they were talking.

Q. Who was the man you saw?

A. That gentleman setting over there (referring to the defendant).

Q. What did you do then?

A. I asked them if they had anything to sell, and that gentleman said, "No, sir." There was another man in there; I suppose he was an Italian; I don't know, but I thought he was from the way he spoke; he asked me if I didn't know it was Sunday, and I said, "Yes; I am a stranger in town, and I thought maybe I could buy some apples," and I just pushed the sheet down and went off about my business.

Q. What time of day was that

A. Somewheres not far from 12 o'clock.

Q. In the daytime?

A. Yes, sir.

Q. What were they doing in there?

A. Talking.

Q. Setting or lying?

A. Setting down

Q. In the wagin?

A. Yes, sir.

Q. What part of the stable was the wagon in?

A. The wagon was out in the corral; the horses were in the stable.

Q. You went away then?
A. Yes, sir; walked around the lot.
Q. Did you see anything more of the defendant?
A. Yes, sir.
61 Q. Where and when?
A. I saw him after he came out to water his horses.
Q. Did you see him water his horses?
A. Yes, sir.
Q. What horses were they?
A. I supposed they were the ones he was claiming. They were bay horses; one of them was a bay and he was blind, and the other was a bald-face bay.
Q. Do you know what became of those horses?
A. Yes, sir; I brought them down and Mr. Vandivere came after them.
Q. The same horses?
A. Yes, sir.
Q. These are the horses that he watered?
A. Yes, sir; they fell into my hands up there by the sheriff to hold them.
Q. When was it you saw him take these horses out to water them?
A. On the 27th of December.
Q. Do you know of his doing anything else with the horses?
A. No, sir.
Q. What became of the Italian; was he there?
A. Yes, sir; he was there.
Q. Did you hear him and the Italian have any conversation?
A. Nothing more than they were talking in the wagon.
Q. You didn't hear them have any more, or any, conversation about the horses?
A. No, sir; I didn't pay any attention to them; I seen all I wanted to see.
Q. State what occurred after that.
A. After he watered them he started away from the stable; he left and went across the railroad, went into a little groggy shop; I don't know whether they drank or smoked cigars; I didn't go in there, and Mr. Neal was with me, and I said to him, "Did you get a marshal to make the arrest?" and he said, "No."
62 Q. I do not care for your conversation.
A. I just went right across the street, and I got a man by the name of ——. He is a marshal there; I don't know his name; told him what my business was, and the man was guilty and going off, and I didn't have any authority to arrest him; he was in town, and I was only a pursuiter after the man, and could not arrest him when he was in town, and I wanted to see the arrest made.
Q. Did you examine the wagon to see if there was anything in it?
A. I examined it, but did not examine it then.
Q. When did you examine it?
A. After I came home; after the officers done got it and turned it over to me. It was turned over to me, and for me to see that everything was taken care of; and I kept it and turned things over as good as I could.
Q. You had the defendant arrested?

A. Yes, sir.
Q. Did he tell you his name?
A. No, sir.
Q. Did he say anything to you after you arrested him?
A. He didn't have much of anything to say.
Q. Did you tell him what he was arrested for?
A. The marshal did.
Q. In your presence?
A. Yes, sir.
Q. What did the defendant say, if anything?
A. He made light of it, is all.
Q. What did he say?
A. I could not say that he said anything, really; just made light of it. The first thing he said was, "You almost scared me with those big guns," is about the only things he said. The marshal asked him if he had a team in the stable and he said he had; and I said, "I want to see it;" and he told the marshal that was his team; and he asked the marshal what he was arrested for; and he told him what it was supposed to be for,
63 and he didn't know anything about it; and he says, "Who is murdered? Where at?" And I says, "That's all right, partner; I guess you know all about it." And he said, "You have got to prove me innocent before you can make a criminal out of me."
Q. Did he say you would have to prove him innocent or guilty?
A. He said "innocent." I said, "All right, partner; I don't accuse you of being guilty, but that team I am in pursuit of is in that stable, and if you can give an account of yourself for 30 hours, that settles it." And he said, "If you want to know where I was at, prove it."
Q. That is what he said when he was arrested?
A. Yes, sir.
Q. You brought the team back?
A. Yes, sir.
Q. It was afterwards gotten by Mr. Vandevere?
A. Yes, sir.
Q. What did you do with the defendant?
A. The marshal had the defendant then.
Q. You do not remember the marshal's name, do you?
A. I am not certain, but I think his name was Tom Shellburn; I won't be positive, because I am not acquainted with the man at all.
Q. What day was it you got to McAlester and found the defendant and this team there?
A. It was on the 27th.
Q. That must have been Sunday?
A. Yes, sir.
Q. When did you go back?
A. On the 28th.
Q. State if you went back to the place where these bodies were found any more after that?
A. Yes, sir.
Q. Who did you go with?
A. I went once or twice by myself and I went a time or two with Randolph.

Q. Were you there when Snow was there?

A. Yes, sir.

64 Q. Do you remember what day that was?

A. I think it was on the 30th; suppose it to have been that day.

Q. Was there anything found?

A. Yes, sir.

Q. What was found that day?

A. There was a bracelet found there.

Q. Is this the bracelet?

A. Yes, sir; that is it.

Q. Where was it found?

A. It was found there close to the fire.

The DISTRICT ATTORNEY. I offer this bracelet identified by the witness in evidence.

Q. Was there anything else found?

A. There was an axe found.

Q. Go on and state about it. Who found it and where?

A. Ther' was a man named Will Snow found it.

Q. Were you there?

A. I wasn't right exactly with him when he found it, but I was on the ground helping hunt it.

Q. Go on and tell what you done.

A. It was the supposition around there that it was done with an axe, and we were all hunting for the axe, all anxio's to find it, and when we were hunting for it Will Snow said, "I have found it, boys." Somebody said, "What?" and he said, "The axe."

Q. Were you on the same side of the creek as him?

A. No, sir; I wasn't.

Q. Where was it found?

A. Found west fire, still west of the bodies.

Q. On the west side of the creek?

A. Yes, sir.

Q. On the opposite side from the fire?

A. Yes, sir.

Q. Found where?

A. In a hollow tree.

65 Q. How far from the bodies?

A. Somewheres, I should judge, between 15, 16, or 17 steps; somewhere along there; just about that distance, I suppose.

Q. The blood and the fire was upon one side of the creek and the axe on the other?

A. Yes, sir.

Q. Would you know the axe if you would see it?

A. Yes, sir.

Q. Is the axe I hold in my hand the axe?

A. Yes, sir.

The DISTRICT ATTORNEY. I will now introduce this axe identified by the witness in evidence.

Q. Please state if this axe is in the same condition it was then.

A. Yes, sir.
Q. With regard to this blade, that nick there on it?
A. Yes, sir; the nick was identified before the axe was found.
Q. Now, with regard to the blood on it?
A. That blood was on there when it was found.
Q. What was done with the axe and this bracelet after they were found?
A. When they were found the boy that found the axe took it off with him, and the man that found the bracelet took it off with him.
Q. You didn't go with the marshal and the prisoner, did you?
A. No, sir.
Q. You brought the team back?
A. Yes, sir.
Q. What did you do with the team?
A. I kept the team until Mr. Vandivere came after it.
Q. He got it from you, did he?
A. Yes, sir.
Q. Did Mr. Vandevere identify the team?
A. Yes, sir.
Q. Please state if he had an order from anybody with regard to the matter.
66 A. No, sir; he had no order at all; he identified the team before he ever came to the place at all.
Q. To you?
A. No, sir; to other people, and he brought these people there with him.
Q. Mr. Vandevere is here?
A. Yes, sir.
Q. It is the old gentleman, the father of one of the deceased?
A. Yes, sir; claims to be.
Q. Were you present when the bodies were taken up?
A. Yes, sir.
Q. Were they both taken up at the same time?
A. No, sir; they were not. They were both open when Mr. Bolding came there.
Q. When Mr. Bolding came there were you present?
A. Yes, sir.
Q. How did you bury them?
A. I wasn't at the burial at all.
Q. You were there when they were taken out?
A. Yes, sir.
Q. How long after this killing was that?
A. I never kept any particular time of the days, anything like that, but I think it was on the 7th or 8th of January when Mr. Bolding raised his son.
Q. Were they both in the same graves or different graves?
A. Both in the same graves but different boxes.
Q. Which coffin was opened first?
A. Mr. Vandevere's son.
Q. Please state if he was identified by Mr. Bolding?

A. As soon as the lid was raised off of the coffin he said that was poor Ed; that is not my son; that is Ed. Vandevere. As soon as the other one was opened he said, "That is my boy."

Q. He identified his boy?

A. Yes, sir.

Cross-examination by Mr. J. C. HODGES:

Question. When did I understand you to say the axe was found?

A. It was found about the 30th, I think, of December.

67 Q. At that time you didn't know anything at all about who these parties were, did you?

A. No, sir.

Q. What did you mean when you told the jury that that little nick out of the axe was identified before it was found?

A. I said the axe was identified; Mr. Vandevere said it had a nick.

Q. You said it was identified before it was found; what did you mean by that? Did you see Mr. Vandivere before it was found?

A. No, sir; I seen Mr. Vandevere before Mr. Vandevere seen that axe when it was found.

Q. You told the jury that the nick out of the axe was identified and described before the axe was ever found. Did you mean to say that? That is not what you meant, is it?

A. I meant that the axe was described before Mr. Vandevere seen the axe.

Q. But after it was found before he seen it? You used the word, before it was ever found."

A. I guess the axe was used several years.

Q. In all of your examination there you saw but one place where anybody had been dragged?

A. No, sir; I said I seen where they had been dragged.

Q. Only one place, only one drag?

A. That is all.

Q. That is a fact, is it?

A. That is a fact as far as I know.

Q. You were there and had as good an opportunity as anybody to see, did you not?

A. If I had staid there I would have had just the same chance.

Q. You were one of the first men there?

A. Yes, sir.

Q. You were there with the crowd again?

A. Yes, sir.

Q. Tell the jury when you saw this impression, or appearance, as if somebody had been dragged, or something dragged, where did

68 it commence and where did it end?

A. It was dragged over the ground there from the fireplace, from right close to the fire to the bank.

Q. You say there was blood on this tree?

A. Yes, sir.

Q. Within 6 or 8 steps of the bank, up four or five feet on that tree?

A. Yes, sir; about 9 steps from the fire.

Q. Within 8 or 9 steps from where the man seemed to have been dragged; there was blood on that tree as though there had been a struggle around that tree?

A. Yes, sir; there had been a struggle around that tree, from all appearances.

Q. You saw a pan out 20 or 30 steps from the fire, and the spoon was about half way between the pan and the fire?

A. Yes, sir.

Q. The other was setting on the fire with a rock in it?

A. Yes, sir.

Q. This was on the 26th of December?

A. Yes, sir.

Q. What time of day?

A. About 11:00 o'clock when I went down there.

Q. Do you know whether anybody had been at that place after the wagon left, before you went there?

A. I don't know a thing about it.

Q. You have no knowledge how the rock came on the fire with the pan, how the rock came to be in the pan on the fire, or how this pan came to be thrown off to one side?

A. No, sir.

Q. From the pan, what direction was the pan lying?

A. It was a little southeast course; a little east of south from the fire.

69 W. G. BAERD, having been recalled upon behalf of the Government, was examined by the district attorney, William H. H. Clayton, and testified as follows, to wit:

Question. When you examined these bodies you stated you found these things upon them in the pockets; please state if you found any money.

Answer. No, sir.

70 WILLIAM H. SNOW, having been duly sworn upon behalf of the Government, was examined by the district attorney, William H. H. Clayton, and testified as follows, to wit:

Question. Is your name William H. Snow?

Answer. Yes, sir.

Q. Where did you live last Christmas?

A. I lived at Mr. Baerd.

Q. Please state if you were with a party of gentlemen at the place where Mr. William D. Bolding and Samuel Vendever were said to have been killed; if you were there shortly afterwards.

A. Yes, sir; I was there; they were killed on the 26th, and I was there that evening; I was there a few minutes.

Q. Please state if you were there after that.

A. Yes, sir.

Q. When?

A. It was about 5:00 o'clock.

Q. I mean some other day that you went there that an axe was found?

A. Yes, sir; I was there on the 30th of December.

Q. Please state if you find anything upon that day; and if so, what?

A. An axe.

Q. Where did you find it?
A. About 15 steps from where the dead bodies were laying.
Q. Which side of the creek?
A. On the west side.
Q. You know where the camp fire was?
A. Yes, sir.
Q. On the same side or the opposite side of the creek from that?
A. Opposite side.
Q. Where did you find it?
A. In a hollow tree.
Q. What kind of a tree was it?
A. I do n't know; it was a tree that was hollow.
Q. Would you know the axe?
A. Yes, sir.

71 Q. Is this it?
A. Yes, sir.

Q. Is it in the same condition now it was then?
A. Yes, sir.
Q. Had that blood on it?
A. Yes, sir.
Q. Have that place out of it?
A. Yes, sir.
Q. Just take the axe and show how it was in the tree.
A. Standing right up in that way in the tree.
Q. How big a hole was it?
A. It was a small tree; the hole burned out in the tree from the root.
Q. Which way did the hole front, towards the bodies or from them?
A. From the bodies.
Q. This part (the blade) was down?
A. Yes, sir.
Q. What did you do with it?
A. I took it home and turned it over to Mr. Baerd.
Q. Were you present when this bracelet was found?
A. Yes, sir.
Q. Who found it?
A. Jim Hendricks.
Q. Where was that found?
A. Right close to the fire; I do not know how far it was from it.
Q. Do you know what became of it?
A. I think he took it and turned it over to Mr. Baerd, too.
(Cross-examination waived.)

72 J. H. NEAL, being called on behalf of the Government, and examined by the district attorney, testified as follows on direct examination, to wit:

Q. Where do you live?
A. At Wilburton, Choctaw Nation.
Q. Did you live there last December?
A. Yes, sir.
Q. Please state if you went down to where the bodies supposed to be Vandiveer and Bolding were found.

A. Yes, sir; I went down there on the 26th, about one o'clock, after the murder was done that morning or the night before.

Q. One o'clock in the evening?

A. Yes, sir.

Q. Were you one of the first that got there?

A. No, sir; the first parties that got there were the ones that discovered the bodies; I was in the gang that went out from Wilburton afterwards.

Q. Who went with you?

A. A man by the name of Lafollette, and a man—I can't think of his name.

Q. What was it you first saw when you got there?

A. The first thing we discovered was a camp fire, and the next thing we discovered was the blood where the murder had been done. There was a pan sitting there on the fire with a rock in it.

Q. Is this the pan [showing witness pan]?

A. Yes, sir.

Q. You say you found blood; where was that?

A. Right at the camp fire, some two or three feet from the end of the sticks of wood.

Q. Describe the blood that you found.

A. There was a good-sized puddle of blood lying there, and some kind of dough; I suppose a foot and a half or two foot around, maybe; looked like there had been dough and leaves thrown over it.

Q. Is that all the blood you saw?

A. No, sir; there was blood continuously from there to the
73 bank where the bodies had been thrown over.

Q. Did you see any other signs there?

A. I seen blood on a tree, spattered up.

Q. About how high?

A. I noticed it splattered up on it as high as my head.

Q. Splattered or smeared?

A. Splattered against it.

Q. Where was that tree located?

A. It was located just to the right; that is, from the camp fire going to the west was the course the bodies were dragged from the fire, just a little north of the trail where they were dragged from the fire to the bank of the branch, about seven or eight steps; something near that.

Q. You speak about the bodies being dragged; how do you know?

A. It showed they were dragged; there was a dragged place where the ground seemed to have something dragged over it; there were dragged until they got right close to the bank, and then it looked as if they had been separated, and two trails then.

Q. From what point were they dragged?

A. Both seemed to be right from the camp fire.

Q. To what place?

A. To the bank of the branch where they were thrown over a little cliff or bluff.

Q. How high was that bluff?

A. I think a little higher than my head; some six or seven feet high, or maybe a little upwards.

Q. Now, then, you discovered a pan upon the fire with a rock in it, and you speak of the blood, and the drags, as you call it, from the fire to the p'ace where the bodies were found; now, what I want to get at is whether the blood was all the way along or just in places along?

A. There was puddles, I expect three or four, or something like that, along the way; one puddle close to the tree, one close to the fire, and
74 right at the bank. When I first went there there was right smart puddle of blood on the bank, and then it was splattered along the trail that lead from the camp fire to the bank where they were thrown over.

Q. Did you observe anything else?

A. I noticed that pan there that had been thrown, I reckon, some 15 or 20 steps out, kind of southeast course; had a little dough in it, leaned up against a tree; we pronounced it had been thrown there. And there was a spoon laying about half way between the pan and the camp fire. I found the spoon myself.

Q. Were you there when there was anything found in the fire?

A. Yes, sir; a man by the name of Flippo picked up a stick and went to grappling in the fire, and I noticed a little piece of metal or brass that he grappled out of the fire.

Q. Is that it?

A. That l'oks to be it. And that iron there, somebody picked that up; I don't know who it was took it from the fire.

Q. The bodies were there in the bed of the creek?

A. Yes, sir.

Q. Did you see where there had been any horses there; anything of that kind?

A. Yes, sir; it seemed there had been feeding done a north course from where the camp was, some seven or eight steps; I couldn't say as to that, because I did not step the ground; I just noticed a wagon had been there, and feeding had been done; had been tramped around by horses.

Q. Please state if you went in pursuit, and tell all about it.

A. There was some suggestion made there that we send a couple of men on in pursuit of the parties, and somebody said "No;" that it wasn't our place; that the Government had men to attend to this business, and we had better not do it——

74 Q. Never mind your conversation. Did you telegraph? I suppose that is what you are getting at. Did you telegraph for a marshal?

A. Yes, sir.

Q. Go on and state if you went in pursuit.

A. Yes, sir; myself and Mr. Flippo; we took up the trail; when we first went out there was a man, I forget his name, went back on the back trail of the wagon to Mr. Baerd's. This boy was a Choctaw boy, I could not call his name, that back tracked.

Q. Was it McLaughlin?

A. I can't think of it now.

Q. Did you get a description of the team?

A. Yes, sir.

Q. Now, then, go on from there.

A. We went on from there on the prairie about a mile, somewhere near that from where the murder was done, to a man named Denton——

Q. Did you take any trail?

A. Yes, sir; we went right on the trail of the wagon; we could see where it went through the prairie to where it took the Hartshorne road, and we went on to the section house——.

Q. Did you learn or hear of it there?

A. No, sir.

Q. Go ahead.

A. We went on to Denton's, about a mile from where the murder was done, and we learned there that a team had passed there; he could not give a full description, but he said he saw a team. We went on from there on top of the mountain, about halfway between Wilburton and Hartshorne. Some seven miles from Hartshorne we stopped at a house; there was two parties that seen the team pass, and they gave us full description of the team; and then at No. 3 shaft, about five miles this side of Hartshorne,
at a coal-mining shaft there was several persons there that seen the
76 team pass. We went on from there right to the edge of Hartshorne,
and we stopped there and got a description of the team by the oil-cloth housing they had on. We went on up to a hotel at Hartshorne, and the next morning we went on through town and we got to this nigger house, Jennie Jones', and she said such a person had stopped there the day before and fed a team, and we went on; and the next place we found was at the section crossing right beyond Hartshorne—I don't know the exact distance—and then we went to a railroad camp—I don't know what the name of it is—about halfway between Hartshorne and Alderson, and there was a tent stretched there, and children was all there was present there, and they gave us a description of the team, and said such a team passed by there that went into Alderson; everybody we met along the road noticed the team driving through. I told Mr. Flippo that we would not make any further inquiries; we would go to the livery stable at old McAlester. There was a road leading through there, and he would be likely to put up there, and we went on to the livery stable and asked if there had been a team of that kind passed through, and they said "no; we have not seen it." There was one man said he had not seen it, and another man told me that there was just such a team as that in the stable then. We went into the stable then, examined the housing, and satisfied ourselves that it corresponded to the description of the team and outfit we were after, and we got a marshal and arrested the man.

Q. Where did you find him?

A. In the livery stable, making a sale to a couple of miners.

Q. Did you hear him trying to make the sale?

A. Yes, sir; I stood and listened to him, I suppose, for half an hour.

Q. What did he say—who was this?

A. John Pointer.

77 Q. Do you know him?

A. Yes, sir; when I see him.

Q. Where is he?

A. That gentleman setting over there [pointing to the defendant]. He was in the wagon when I went to look at the team; but after that he took them to water and put them back in their stalls. Him and this old gen-

tleman (I forget his name; I heard his name called), a miner there, he said, "Well, if you want to take that for them I will carry you down and show you where to take the team and deliver it to-morrow morning," and they passed right on through the livery stable and went over there to the hotel.

Q. Is that all that was said about selling?

A. That is all I heard. We kept watch of him, and we got Mr. Shellburn, the marshal, and went and arrested him and brought him back.

Q. Please state, if you know, where he was staying at that time.

A. Yes, sir; he was staying at John Lutz's hotel. His satchel was there, and he had registered there.

Q. Did he give you his name?

A. Yes, sir.

Q. What name?

A. Longley. I went with him next morning to the hotel to get his satchel.

Q. Did you get the satchel?

A. Yes, sir.

Q. Please state if this is it.

A. Yes, sir; it is. It is got J. P., I think, if I am not mistaken, written on the side of it.

Q. Look at this satchel, and see if that is the satchel you got.

A. Yes, sir.

Q. Do you know what was in it?

A. No, sir; any more than there was some pants and shirts; we were just looking for weapons when we looked through the satchel.

Q. What did you do with it?

A. I turned it over to the jailor.

78 The COURT. What letters are on it?

A. J. P. I never noticed that on the side; I just noticed that at the latch there.

The DISTRICT ATTORNEY. You say that *ye* have you his name as Longley?

A. Yes, sir; George Longley.

Q. When he was arrested please state if you informed him what he was arrested for?

A. I will have to word it for you to get th' correct sense of it; we went on down some 50 or 60 yards from where he was, and nothing had been said, and Mr. Longley, or Pointer, whatever his name is, he said, "You fellows almost scared me with those big guns drawed on me." Mr. Flippo spoke up and said, "If you can not give your whereabouts on Christmas night you will be scared worse than that." He said, "Hold on, partner, I am not standing no trial now," just that way; and we went on down, and just about the time we got into the livery stable I said to him, "Young man, we are on pursuit of a party supposed to have murdered two men; you have the team that satisfied the description of the team seen there that was with them;" and he said, "I am not now on trial;" a'd he said, "A man has got to be proved guilty before he is a criminal;" and I said, "All right." So'e time during the night he said that he camped on Beaver Creek, 41 miles from there on the route from Ft. Smith; that was sometime after supper.

Q. Where is Beaver Creek?

A. I don't know where it is; I have heard there is such a creek as that somewhere up on the Arkansas River.

Q. Is there any Beaver Creek in your neighborhood?

A. No, sir.

Q. Of your own knowledge you do not know anything about his selling or trying to sell the team. You do not know how much was the price?

A. No, sir; only what I heard.

Q. What did you do with the team?

79 A. I went in there to the livery stable, and this man McGee was in there also at the time, and we searched the wagon, and Mr. McGee said I will just appoint you to go with Mr. Shellburn to take this man in. I paid the livery charges on the team, and Mr. Flippo took the team and started back to Wilburton with it.

Q. Did you go with the prisoner?

A. Yes, sir.

Q. What did you do with him?

A. Brought him here to Ft. Smith and turned him over to the jailer.

Q. How long were you with him?

A. The arrest was made sometime in the afternoon somewhere between 3:00 and 4:00 o'clock on Sunday evening, and we got in with him Monday morning; got here about 1:00 o'clock.

Q. When was it that he first told you that his name was George Longley?

A. After we got back to Mr. Shelburn's house or office and put him under guard he told me his name.

Q. Did you hear him at any other time call the name?

A. Yes, sir, at the hotel; and I heard the jailer over here ask him, and he told him that, and I heard him claim that name before the commissioner over here.

Q. Were you present when he registered over here at the jail?

A. Yes, sir.

Q. What name did he give the jailer?

A. George Longley.

Q. How long did you remain here at the time you came with him?

A. Tuesday morning we had the trial before the commissioner.

Q. The trial was on the 29th of December?

A. Yes, sir.

Q. Did you go home that day?

A. No, sir; I didn't go home until the next day following.

Q. Did you go down to the place any more where the killing

80 was done?

A. Yes, sir.

Q. When did you go there?

A. I went there, it must have been about the first day of January. I took a description of everything I could, the team, and the words that were on the wagon sheets, and everything, and sent it back here to Marshal Yoes.

Q. Describe the wagon.

A. The wagon was put up somewhere in Missouri; there was no name of the maker of the wagon on it, only just printed onto the seat "Our own" in big white letters.

Q. Did you see anything on the tail gate?

A. I seen the name of H. Cladwell; seemed to have been written with a small paint brush.

Q. What kind of a wagon sheet was it?

A. It seemed to be *k*new.

Q. With regard to this cover over the he*i*m's.

A. It was made with oilcloth.

Q. How large a pe*i*ce?

A. I don't know; I suppose about 18 or 20 inches square; two holes cut through it and slipped down over the nubs of the he*i*m's.

Q. Any time you were with the defendant did he tell you his name was Pointer?

A. No, sir.

Q. Did you tell him you had found two men?

A. Yes, sir; we carried him back on the side next to where the murder was done, as we came down on the train, and he said he didn't know anything about it.

Q. Did you find anything on the defendant's person?

A. Yes, sir; we found a *a* watch, a pe*i*ce of leather of some kind, and a pocket book with $8.60 in money, and a pocket knife.

Q. Is this the watch?

A. Yes, sir; I think that is it.

Q. What did you do with it?

81 A. The defendant kept it until he came here, and then the jailer, believe, took it away from him.

Q. Where was this pe*i*ce of leather?

A. In the vest pocket.

Q. Where was the pocket book?

A. I could not say for sure.

Q. Do you remember a watch key?

A. Yes, sir; I took these things out when I put him under guard, and the pocketbook had $8.60 in money in it, and the knife was on him.

Q. Did you ever apply this watch key to this watch?

A. No, sir.

The DISTRICT ATTORNEY. I will introduce these things identified by the witness in evidence.

Q. You may state if you were or not at the burial.

A. No, sir; I wasn't there.

Q. Is there anybody here who was?

A. Yes, sir; the minister.

Q. Were you at the place when they were taken up?

A. Yes, sir.

Q. Was the minister there?

A. Yes, sir.

Q. His name is Peter Adamson.

A. Yes, sir.

Q. You saw the men that were killed.

A. Yes, sir.

Q. When they were opened up did you see them?
A. Yes, sir.
Q. Were they the same men?
A. Yes, sir.
Q. The same men you had seen out at the branch?
A. Yes, sir.
Q. You had seen them before at the branch?
A. Yes, sir; I helped put them in coffins, but didn't help bury them.
Q. Please state which one of them was taken up first.
A. Mr. Bolding came down from Eureka Springs and he described a scar that was on his son's cheek——
Q. Had you observed that scar?
A. Yes, sir; when we took them up we took both of them up at the same time; they were laid right side by side in the ground,
82 and they didn't know which was 'tother, and they opened the box with Mr. Vandevere's son in it first, and he said that was Vandevere's son, and not his son, and when they opened up the other box he fel' down and commenced crying, and said that was his son.

Cross-examinatien by Mr. J. C. HODGES:

Question. You made that trip with Mr. Flippo?
A. Yes, sir.
Q. Mr. Flippo does not ever talk any does he?
A. I don't know—he talks very often.
Q. I noticed in your testimony that you did all the talking that was done on that trip, and did he say anything at all?
A. Yes, sir; he talked some little along.
Q. You said nothing that he said, and you did all the talking?
A. I didn't tell anything only what I said myself; I did tell something that he said, when he spoke about his whereabouts Christmas night.
Q. I believe you claimed to be one of Pinkerton's men on that trip, didn't you?
A. No, sir.
Q. Do you state on your oath you did not state to this defendant you were a Pinkerton detective?
A. Yes, sir; I do.
Q. You made no such statement?
A. I did not.
Q. Did you have any private talk with this defendant?
A. Yes, sir; we talked private along several times.
Q. Did you tell him anything about what you would do?
A. I said "If you are an innocent men I am your friend, and I will do everything for you in my power."
83 Q. You wanted him to tell all he knew?
A. Yes, sir; I asked him about the case, and I said if you are guilty of it, and——
Q. Didn't you tel' him to tell all he knew about it, and you would stick to him?
A. No, sir.
Q. You told him that he was in the hands of an officer, and if he would tell where he was at a certain time you would turn him lo'se?

A. Yes, sir.

Q. You saw where there had been two distinct drags over the ground?

A. No, sir; I said there was a drag just before they got to the creek that showed there had been a drag there.

Q. Didn't you state in answer to the district attorney that the' commenced at the fire?

A. Yes, sir; they did; they didn't show to be separated until they got to the bank where they were thrown over.

Q. What do you mean by that?

A. They were dragged along the same trail.

Q. How do you know that?

A. It is shown to be that way.

Q. There was one drag?

A. Yes, sir; when they got near the bank of the branch it was shown to be two.

Q. What did you say they were both dragged from the fire place for?

A. I don't know that they were.

Q. You didn't mean that?

A. I said there was a drag from the fireplace; when it got there it showed to be two.

Q. The fact is now there was one impression from there near the fire to the bank?

A. Yes, sir.

Q. And there was another impression from there close to the bank *to the bank?*

A. Yes, sir.

Q. They forked out just before they got to that bank?

84 A. That is the way it seemed to me; just about the distance from me to you (about 10 or 15 feet) they forked out.

Q. How far was the tree from the bank that had the blood splattered on it?

A. I suppose it was about some ten steps from the bank; something near that.

Q. It was up on the tree about as high as your head.

A. Yes, sir.

Q. Did you examine the wounds of the dead men?

A. Not closely.

Q. You are not prepared to give any minute description of the wounds?

A. No, sir; I could not say that I could; they were hacked or chopped in the head with the axe. The place that was in Mr. Boldin's son there [indicating] I never noticed that until he was taken up.

Q. That wound you never noticed on that man, notwithstanding you helped wash him and put him in the coffin, until after he had been taken up?

A. I didn't help wash them.

Q. I thought you said you helped put them in the coffins?

A. If you understand, they were merely put in boxes, and after the father came down they were put in new boxes.

Redirect examination by the DISTRICT ATTORNEY:

Question. You did not help put them in the coffin the first time?

Answer. No, sir.

Q. It was the second time you put them in the coffin?
A. Yes, sir

The COURT. Was there any marks or letters on the wagon sheet
85 that you noticed?

A. There was the name of the man who sold it in Eureka Springs. I wrote it to Col. Yoes, but I forgot the man's name.
Q. How do you know it was sold by him?
A. It said on the wagon sheet in print, Eureka Springs, Arkansas.
The DISTRICT ATTORNEY. Would you know the name if it was suggested to you?
A. Yes, sir.
Q. H. T. Siedel?
A. Yes, sir; that is it; Eureka Springs, Ark.
(Here court took a recess until 1:30 p. m.)

86 Afternoon session; 1:30 o'clock p. m.

W. G. BAERD, having been recalled upon behalf of the Government, was examined by the district attorney, Mr. William H. H. Clayton, and testified as follows, to wit:

Question. I believe you stated when you were on the stand before, about a man coming to your house after these bodies were found—I believe you stated that—to make inquiries as to the description of the team you saw at your house that evening?

Answer. There was a fellow named James Laughlin came to my house and told me about these men being dead in the creek, and at the same time he made inquiry as to the description of the wagon and team.
Q. You gave it to him?
A. Yes, sir.

87 Mr. J. H. NEAL, having been recalled upon behalf of the Government, was examined by the district attorney, Mr. William H. H. Clayton, and testified as follows, to wit:

Question. Please state if you found anything in the wagon.
Answer. Yes, sir.
Q. What did you find?
A. We found about 6 quilts—comforts; I have got a statement here of what was in the wagon.
Q. Please state if you found these canes in the wagon.
A. Yes, sir; one was an umbrella cane, and the other was made of a hickory stick.
Q. Are these the canes?
A. Yes, sir.
The DISTRICT ATTORNEY. I now introduce these two canes spoken of by the witness, in evidence.

88 Mr. O. B. FETTER, having been duly sworn, was called upon behalf of the Government, and being examined by the district attorney, testified as follows, to wit:

Question. Where do you live?
Answer. I live out on the Choctaw road, west of Wilburton, three miles and a half.

Q. How far do you live from where the bodies of Mr. Vandevre and Mr. Bolding were found?

A. About a quarter.

Q. Please state if you were at home on last Christmas day?

A. I was.

Q. Did you see these two men after they were killed?

A. Yes, sir.

Q. When did you se' them?

A. The evening of the 26th.

Q. Please state if you had seen either of them on the evening of the day before?

A. I seen one the evening before.

Q. Which one?

A. The youngest one, Mr. Bolding.

Q. How do you know he was the man you saw?

A. He came to buy hay of me, and I knew him when I went to see them after they were dead.

Q. When did he come to buy hay of you?

A. Christmas evening, between sundown and dark.

Q. He was then alive?

A. Yes, sir.

Q. Did he buy any hay?

A. He bought a bale.

Q. Did he pay you for it?

A. Yes, sir.

Q. What did he pay you?

A. 20 cents, ten cents and two nickles.

Q. Did he have a pocketbook?

A. Yes, sir.

89 Q. What kind of a pocketbook did he have?

A. I don't know hardly what you would call it; something like a poke, something similar to that.

Q. Did he open it?

A. Yes, sir.

Q. Did he have any money besides that?

A. He had what looked like 75 or 80 cents that he called chicken feed, nickles and dimes.

Q. Do you know whether there was more than one compartment in his pocketbook, or more?

A. I could not tell.

Q. Do you know what kind of a pocketbook it was he had?

A. It was a buckskin purse, round, similar to the one I have.

Q. He paid you 20 cents for the hay?

A. Yes, sir.

Q. What time was it you saw him on Christmas evening?

A. Just at dusk.

Q. The next day you saw the same man dead, did you?

A. The next day I saw the same man by lantern light; I had went to Hartshorne and came back in the evening.

Q. Where did you see him after he was killed?

A. On the 26th, right where they were tumbled off the bank.

Q. You recognized him as being the same man?
A. Yes, sir; by a lantern light.
Q. I believe you drafted this map, didn't you?
A. Yes, sir.
(Witness here states what different marks represent on plat.)
Q. What direction does that Stringtown road run that Mr. Beard lives on?
A. Southwest course.
Q. Do you know whether that goes down to Stringtown or not?
A. I suppose it does.

Cross-examination. Mr. J. C. HODGES:

Question. What time of day was it that you saw the man on the evening of the 25th?
A. Between sundown and dark, just at dusk.
Q. What size man was he as compared with the defendant here?
A. Some larger.
Q. How was his complexion?
A. Tolerable fair; he was fair complexion.
Q. What is the difference now in the looks of the two men?
A. There is considerable difference.
Q. You never saw the man before the time that he come to get the hay?
A. No, sir.
Q. How long did he talk to you?
A. About three or four minutes.
Q. Did you take any particular notice to the man?
A. Yes, sir; I looked him right in the face.
Q. Of course you looked at him; did you look at him particular?
A. Yes, sir.
Q. Could you tell after he went away how he was dressed?
A. Yes, sir.
Q. Would you have known how he was dressed if you had not seen the man next day?
A. I think I could.
Q. You think you can see a man between sundown and dark, a minute or two, and then see him dead, and you would know him to be the same man?
A. I do.
Q. Did he have a mustache?
A. No, sir.
Q. None at all?
A. No, sir.
Q. No beard?
A. No, sir.
Q. Did he have on a vest when you saw him?
A. Yes, sir.
Q. Did he have on an overcoat?
A. He had a short coat on.
Q. Did he have on shoes or boots?
A. Shoes.
Q. Did you notice these things that evening when he bought the hay?
A. Yes, sir.

Q. You noticed that he had on shoes then?
A. Yes, sir.
Q. What called your attention to these things?
A. He asked me for the hay, and I just took him up and down.
Q. You looked him up and down because he asked you for hay?
A. Yes, sir.
Q. How came you to notice his pocketbook so particularly?
A. Because he opened it to the sunlight.
Q. Sunlight between sundown and dark?
A. Yes, sir; light of the sky.
Q. What do you mean by saying sunlight between sundown and dark?
A. It was the evening light.
Q. Aurora Borealis?
A. No, sir; the light from the sun on the sky.
Q. You recognized him when you saw him dead?
A. Yes, sir.
Q. Was the man wounded any?
A. Yes, sir.
Q. Where?
A. Right down in front of his head here.
Q. Had it been done with a sharp instrument or a blunt instrument?
A. I could not tell how it was done, but the wound come down close to his nose here.
Q. Any more wounds on him?
A. Yes, sir; one on the back part of his head; right here, somewheres [indicating], and right here.
Q. Was his throat cut? About how long was the gash?
A. Inch and a half, or two inches.
Q. You didn't see anybody else with him when he come after hay?
A. No, sir.

92 JACK PHELPS, having been duly sworn upon behalf of the Government, was examined by the district attorney, William H. H. Clayton, and testified as follows, to wit:

Question. Where do you live?
A. I live near Wilburton; three miles and a half of it.
Q. Please state if you went down to the place where the bodies of the two men, Vandevere and Bolding, were found, after they were found. Were you there when the axe was found?
A. Yes, sir.
Q. You went down with those men?
A. Yes, sir; I was there.
Q. Who was with you on *on* the day the axe was found?
A. There was Mr. Snow, a man by the name of Geddy, a man by the name of Hendricks, and Mr. Beard, a son of the old man.
Q. What I want you to state is what you found on that day, how you came to find them, and what was done.
A. This man Hendrick found a bracelet there; he found that, though, before I got to the ground that morning; the axe was all that was found while I was there.

Q. State how you come to find it, whether you discovered any tracks leading that way, and all about it.

A. We went to this embankment, where the bodies seemed to have been put over, and I says, "Boys, if there has been anybody ever looking around in this thicket over here I never have seen them on the other side of the branch," and this young man Snow and myself and young Mr. Baerd went across down there; we went right in below where we were standing on the bank; we went down a few steps, went down there, and come up in the branch where the bodies had laid, and I went there to look for a track to see if I could see any track leading from
93 there. When I went out there this young man Snow he walked in just across the same place, but he went further out into the thicket; I was just looking around there to see if I could see any tracks, and Snow said, "Here's the axe."

Q. Did you find any tracks?

A. I could see one, but I could not tell just where the track went to.

Q. You were with Snow when he found the axe?

A. Yes, sir; he just picked it up, and said, "Here's the axe."

Q. You were there at that time?

A. Yes, sir.

Q. Would you know the axe if you would see it?

A. Yes, sir; I think I would.

Q. Is this it?

A. Yes, sir; that is the axe, I think.

(Cross-examination waived.)

94 MINNIE JONES, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Where do you live?

Answer. I live in Hartshorne.

Q. Where did you live last December?

A. In McAlester.

Q. Were you living at McAlester when these men were killed up there?

A. No, sir; I was living at Hartshorne then.

Q. Were you living right in Hartshorne?

A. I was living out kind of from Hartshorne, out in the woods, kind of like.

Q. What direction?

A. I don't hardly know what direction you would call it, but I live like you go to McAlester—same way by the road.

Q. About Christmas, on the day after Christmas, please state if anybody came to your house.

A. Yes, sir; somebody came to my house on Saturday.

Q. Was that the day after Christmas?

A. Yes, sir.

Q. How did they come?

A. They come in a wagon.

Q. One man, or two?

A. One man.

Q. Did he tell you his name?

A. No, sir.
Q. What was his business?
A. He stopped there to feed his horses, I suppose.
Q. Can you describe the horses, or the harness, or anything like that?
A. He had oilcloth on both of their shoulders.
Q. Would you know the man if you would see him again?
A. Yes, sir; I think I would know him.
Q. I don't know whether you can find him in the room or not; you have just come in.
(Witness looks around room.)
Q. He has not been pointed out to you since you came, has he?
A. No, sir.
Q. Do you think you would know him if you would see him?
A. Yes, sir; he had on old clothes then; I don't know how he is now.
Q. Is this the man here (referring to Assistant District Attorney Fannin)?
A. No, sir; that ain't him; he was a young-looking fellow.
Q. Did he give you his name?
A. No, sir; I didn't ask him his name at all.
Q. (After a pause, during which witness looks around room.) You do not find him, do you?
A. I can't find him setting down, but I could find him if he was standing up, I think.
Q. Well, we will go on, and I will point him out to you after awhile, if you can not find him. What time of day did he come to your house?
A. I don't know exactly, but I think it was after 12—yes, it was after 12, because my husband just come to his dinner.
Q. What is your husband's name?
A. Henry Jones.
Q. State all that occur'ed while he was there.
A. Well, he just came to my house there, and he went there in the road, my little boy was playing out there, and he sent him in with sack of flour, and told him to give it to his mother, and after awhile he came back with one of these large cans and give me that.
Q. Did it have anything in it?
A. No, sir.
Q. What was he giving them to you for?
A. I never asked him; I just took them. He said he was not going to cook any more on the road—was going to buy provisions.
Q. Did he say where he was going?
A. No, sir; I said "Whereabouts do you live?" and he said "Up in Fort Smith;" and I asked him if he was peddling, and he said no; just travelling.
Q. Did he eat his dinner there?
A. He had a peice of bread in his hand when I saw him.
Q. What did he do with his horses?
A. He carried them away with him in the wagon.
Q. Were they fed out there?
A. He fed them when he stopped there.
Q. Where did he get feed?
A. I don't know, sir. I suppose he might have had it with him.

Q. Did you give him anything for these things he gave you?
A. No, sir.
Q. What did he give you?
A. He gave me one of these yard cans, and a half a sack of flour, and a bottle of soda. That is all he gave me.
Q. How long did he stay there?
A. He just staid there until he went to town and came back; he went to get him a Winchester, and he could not get it.
Q. How do you know that he went to get a Winchester?
A. He said he did.
Q. What did he say about it?
A. He asked my little boy where he could buy one at.
Q. Did you hear him?
A. Yes, sir.
Q. Just tell what he said about it.
A. He said he wanted to buy a Winchester, and went up to town to get one, and he could not get one, I guess, because he came back without one.
Q. Did anybody tell him where he could get one when he asked?
A. My little boy told him that he could buy one at the hard-
97 ware store, and he went to town and came back without a Winchester.
Q. When he left, which way did he go?
A. Went up towards Hartshorne, up in town.
Q. You say he was a young man?
A. Yes, sir.
Q. Did he have anything with him besides his horses and wagon?
A. That is all I seen, and a dog.
Q. What kind of a dog was it? Describe the dog.
A. It was a black dog; white spot around its neck.
Q. What kind of a looking dog was it?
A. A kind of a shep'ard-looking dog.
Q. White spot on the side of his neck?
A. Yes, sir.
Q. That was the dog that was with him, was it?
A. Yes, sir.
Q. Did you ever see him or the dog afterwards?
A. I never saw him any more after that.
Q. He didn't tell you his name?
A. No, sir.
Q. Did you see some gentlemen come along there inquiring about him afterwards?
A. Yes, sir; two men on Sunday morning.
Q. Did you know who they were?
A. Yes, sir.
Q. Who were they?
A. Marshals, I reckon; I don't know what their names was. I know them when I see them.
Q. They came there inquiring for what?
A. They were inquiring about this man and the wagon.
Q. Which way did you say that he left?
A. Going up towards McAlester, going west.

Cross-examination by Mr. J. C. HODGES:

Q. Does that look like the young man at the end of the table there next to you?

A. No, sir; that ain't him.

98 Redirect examination by the DISTRICT ATTORNEY:

Question. Look at this man over here (pointing to defendant).

A. That is the man.

Mr. HODGES (of counsel for defendant). I object to that.

The COURT. I think it is competent.

Recross-examination by Mr. HODGES:

Question. Have you not been setting there looking at that man ever since you have been on the stand?

A. No, sir.

Q. Have you not looked at him four or five times?

A. I did not recognize him.

Q. How come you to swear it is him now when the district attorney points him out to you?

A. That looks like the man.

Q. Why didn't you tell us so before? Did it change his looks any to have the district attorney point him out to you? You saw him while ago when you were looking around, didn't you?

A. Yes, sir; I seen him, but I didn't recognize him then.

Q. What has opened your eyes all at once? Of course, you know this man now that he is trying to identify, don't you? Now, is this the man?

A. It looks like him.

Q. Do you know?

The COURT. Give your best judgment about it. That is all you are expected to do.

Mr. HODGES (of counsel for the defendant). Is this the man?

A. He looks just like the man; he is the only man in the house

99 that looks like him at all.

Q. Why couldn't you say that at first? You looked right at him for a long time, didn't you?

A. I looked at him, and looked at the rest of them, too, but that man is washed up from the time I seen him; he had on his old clothes then; he is dressed up considerable now.

100 WILLIS V. GILLETT, having been duly sworn upon behalf of the Government, was examined by the district attorney and testified as follows, to wit:

Question. Where did you live last December?

Answer. I lived in McAlester, Indian Territory.

Q. What was your business there?

A. I was working for Mr. Latham in the livery business.

Q. Please state if you know the defendant in this case.

A. I don't know him by name.

Q. Do you know him when you see him?

A. Yes, sir.

Q. Please state if you saw him anywhere about last Christmas time in McAlester.

A. Yes, sir; on the 26th day of December, after Christmas, on Saturday, he came to the barn and put his team up.

Q. What time in the day?

A. Between 6:00 and 6:30 o'clock.

Q. Please state if you were at the livery stable when he first came.

A. No, sir.

Q. Where were you?

A. I had gone to supper.

Q. When you came from supper where did you find him?

A. When I came from supper I went into the front of the stable nearest to the depot, and I seen him drive in at the back gate, back end of the livery stable.

Q. Did you have any talk with him?

A. Yes, sir.

Q. Go ahead and state what it was.

A. I went through the stable—my business is to go and help put up teams—and he drove out about the middle of the yard, and his team stood there, and we unhitched the team, and I went to lead one horse,
101 and he said that horse is blind; you had better let me lead him and you take the other horse.

Q. Did you have any further conversation with him?

A. Whether it was that night or the next morning I don't know, but that night I think he said he could find work for himself, but could not for his team, and he would like to sell his team, wagon, and harness; and I asked him how much he would take for it, and he said he would take $150.00 for the outfit—team, wagon, and harness.

Q. Do you know of his making any offer to sell them to anybody else?

A. The next day he came in; the next day there was an Italian, I think his name was Smithy; he came in there and he said he wanted to see that team that was for sale, and I took him out and showed him the team, and he looked at the team and wagon.

Q. Was the defendant present?

A. No, sir.

Q. Did you hear him and the defendant have any talk about the team?

A. No, sir.

Q. $150.00 is what he asked for the team, then?

A. Yes, sir.

Q. Whose livery stable was that?

A. J. H. Latham's.

Q. What time did you go to supper?

A. I went to supper about 5 or 5:30.

Q. Where did he sleep that night?

A. He went across, I think, to Mr. John Lutz's hotel, across the railroad.

Q. What became of his team and him that night?

A. After feeding his team that night I didn't see him any more that night; the next morning he came there, and we asked him—I believe it was Mr. Cope asked him—if he was going to pull out that morning, and

he said he wasn't much of a Sunday man, but he did not believe in travelling on Sunday; and he said anyway he could get work for
102 himself, and he wanted to sell his team.

Q. Was there anything said as to the brand of the horses, as to where they were raised?

A. The next day he was watering, at noon, his horses——

Q. That was the day after he came?

A. Yes, sir; on Sunday, and Mr. Neal and Mr. Flippo were there and had made inquiries about the team, and so forth, and looked out there where he was, and he brought his horses in and they said something to Mr. Latham about it, and he brought his horses into water, and Mr. Latham said, "That horse was raised in Texas, wasn't it?" And he said, "No, sir; it was raised up about Springfield, Missouri," and he said "Well, it has got a Spanish brand," and he said "No; I raised it."

Q. Use his exact language?

A. I don't believe I can use the exact language.

Q. What became of the team after that, and the man?

A. Then this Smithy was talking with him about the team, and they were out there in the wagon talking about the team, and he staid there probably 30 minutes after he watered his horses, and then he and Mr. Smithy started out.

Q. This Italian?

A. Yes, sir; started out across the railroad and Mr. Neal followed them, and Mr. Flippo went to get a marshal, and then they went and arrested him and brought him back.

Q. What became of the team?

A. Then Mr. Shelburn told me to let Mr. Neal have the team. Mr. Neal paid me for the team, and told me to turn it over to Mr. Flippo, and I hitched up the team for Mr. Flippo and he drove it off.

Q. Do you know what name the defendant went by, there?

A. No, sir; I do not.

103 Q. Did you ever have any conversation with him as to where he was going?

A. Nothing more than I asked him if he had any apples to sell, and he said no; that is all the talk we had.

Q. You did not see him when he came?

A. No, sir; not when he first drove up.

Q. You do not recollect whether it was the evening he came, on Saturday evening or Sunday morning, that he told you he wanted to sell the horses?

A. Saturday evening, I think, and I believe I heard him on Sunday, too. I heard him tell Mr. Cope.

Q. What did he say to him?

A. He told him the same thing he told me; that he wanted to sell the team because he could not get any place for them to work.

Q. Did he tell him what price he set on them?

A. Yes, sir.

Q. Do you have any idea as to the value of the team and wagon?

A. Yes, sir; if I had had the money I would have been willing to pay $125.00 for them. The team was worth $100.00, and the wagon was worth $25.00.

Q. How long were he and the Italian, Smithy, together?
A. From eleven until he was arrested.
Q. This oil cloth; what was that?
A. There was a little table cloth taken and cut up in pieces and put over the *heims* for housing.
Q. Did you notice the wagon cover?
A. Yes, sir; it was, I thought, very near a new one.
Q. Did you notice whether he had a dog with him?
A. No, sir; he had no dog there.
(Cross-examination waived.)

104 JOHN LUTZ, having been sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Where did you live last December?
Answer. I lived in McAlester, Indian Territory.
Q. Do you know the defendant in this case?
A. I know a gentleman by the name of G. L. Longley, registered at my house, but I have heard since his name is John Pointer.
Q. Do you know him when you see him?
A. Yes, sir; there is the gentleman setting over there [pointing to defendant].
Q. When did he come to your house?
A. On the 26th of December, 1891; he registered G. L. Longley, Ft. Smith, Ark. I took the Ark. to mean Arkansas.
Q. What time did he come to your house?
A. As near as I can make it it was between 6:00 and 7:00 o'clock in the evening.
Q. You say that he registered. I take it that you keep a hotel?
A. Yes, sir.
Q. Did he ask for a room?
A. Yes, sir; he wanted a room by himself, alone; asked me if I had one, and I told him I had, and I gave him one.
Q. What room did you give him?
A. No. 10.
Q. Please state if he made any payment.
A. Yes, sir; he paid me in advance.
Q. Do you know of his having a valise there?
A. Yes, sir; he had a little gripsack or satchel.
Q. Would you know it if you were to see it?
A. Yes, sir; that is the one there. I will tell you how I know.
105 When they had him arrested and they come and asked me what room he had, and I went upstairs myself and seen what he had left upstairs, I recollect back of the door was the satchel.
Q. How long did he remain with you?
A. He came there Saturday evening, and he was there until 3:00 o'clock when he was arrested in the afternoon.
Q. Did he spend any money?
A. Yes, sir; he bought a few cigars and paid for his breakfast, and in advance for his dinner. That is all the money he spent. I don't know what he had spent before that—before I got up.
Q. How many cigars did he buy?

A. He bought three.
Q. Did he buy them for himself?
A. He bought them for the man that traded $100 for the team.
Q. What do you know about his trading the team?
A. I don't know anything about it.
Q. Did you hear him say anything about it?
A. No, sir.
Q. Did he say where he was going?
A. No, sir.
Q. Paid in advance, you say, for everything that he got?
A. Yes, sir.
Q. Did you know that he had a team there?
A. No, sir; I did not know that he had a team there until after he was arrested.
Q. You point out the defendant here as being the man?
A. Yes, sir; that gentleman setting there.
(Cross-examination waived.)

106 P. B. BOLDING, having been duly sworn upon part of the Government, was examined by the district attorney, and testified as folows, to wit:

Question. State your name.
Answer. P. B. Bolding.
Q. Where do you reside?
A. Eureka Springs, this State.
Q. Did you know a man by the name of William D. Bolding?
A. Yes, sir.
Q. Was he any relation of yours?
A. He was a son of mine.
Q. Did you know Samuel E. Vandevere?
A. Yes, sir; I knew a man by the name of Ed. Vandevere; I don't know what his other name was.
Q. Where did you know Mr. Vandevere?
A. At Eureka Springs; he was there last summer.
Q. Do you know the defendant, John Pointer?
A. Yes, sir.
Q. Point him out, please.
(Witness points to defendant.)
Q. Is you son dead or alive?
A. He is dead.
Q. Is Ed. Vandevere dead or alive?
A. He is dead.
Q. How old was your son?
A. He was 20 last June.
Q. Where did he live before his death?
A. At home with me at Eureka Springs, until some time in *last* September last.
Q. Then where did he go?
A. Left there to go to Texas.
Q. Anybody go with him?
A. Yes, sir.

Q. Who went with him?
A. Ed. Vandevere, and his brother, Will Vandevere. That is all I know; I didn't see anybody else go.
Q. Mr. Vandevere is here?
A. Yes, sir; and Will's wife. He is a married man.
Q. What was your son's object in going, do you know?
107 A. He was going down there to pick cotton through the fall season and to look at the country.
Q. They left your home in September, 1891?
A. Yes, sir.
Q. Did you ever see him any more after he left?
A. Not alive.
Q. When did you next see him?
A. I next saw him in January.
Q. Where?
A. In the Choctaw Nation, near Wilburton; it was almost in Wilburton, right in the edge of town.
Q. Was he dead or alive then?
A. He was dead.
Q. How came you to go there?
A. From the description of the murdered men that I read in the paper.
Q. You read that description?
A. Yes, sir.
Q. What did you find?
A. It is hard for me to tell, but I will tell it the best I can. I went down there—I came here first.
Q. You communicated with the marshal?
A. Yes, sir; and saw him, and found where they were.
Q. Saw who?
A. Mr. Yoes.
Q. You had read a description of the men?
A. Yes, sir.
Q. Had you *a* read a description of the man they captured that was supposed to be the murderer?
A. I don't think they give his description.
Q. After you came here please state if you saw Pointer.
A. Yes, sir; I saw him here.
Q. Where?
A. In the jail.
Q. Who did you go with?
A. Mr. Yoes, from his office.
Q. How long had you known Pointer, the defendant?
A. Something over three years; that was the first time I met him, something over three years ago.
Q. Did you know him well?
108 A. I have been around where he was for a little more than three years.
Q. He knew you?
A. Yes, sir; and I knew him.
Q. You say that you went over to the jail to see him?
A. Yes, sir.

Q. Did you know what name he went by there up to that time?

A. The paper gave his name as George Longley.

Q. Please state what occurred when you went over to the jail to see him.

A. When I went over to the jail——

Mr. HODGES (of counsel for defendant). I shall object to anything that took place over about the jail; I do not think that is competent.

The COURT. I think it is competent, unless there is some reason other than the fact that he was in jail.

Mr. HODGES (of counsel for defendant). He has not asked anything about the defendant: he asks what took place in the jail.

The DISTRICT ATTORNEY. In reference to the defendant.

Mr. HODGES (of counsel for defendant). In the defendant's presence?

The DISTRICT ATTORNEY. Certainly; I will confine it to that.

Q. You got the marshal to take you over there?

A. Yes, sir.

Mr. HODGES (of counsel for defendant). I object to that; that is all improper.

The COURT. That does not affect the case one way or the other. It is merely explanatory as to how he come to go there.

The DISTRICT ATTORNEY. You and Mr. Yoes went together to the jail?

A. Yes, sir.

Q. State what occurred with relation to the defendant, and in his presence.

109 A. I was carried in the office where they bring prisoners out, a consultation room, I suppose, and this man was brought out, and I turned and said to Marshal Yoes, "That is John Pointer."

The COURT. That was in the hearing of the defendant?

A. Yes, sir. John Pointer turned to Marshal Pape and said, "Who is that man; I don't know him?" and I said, "John, you have seen me before," and he said, "No," and Marshal Yoes said, "That is enough," and took me away, and he was carried back to jail, and that is about all that was said in his presence. I knew him as quick as I saw him. I told Marshal Yoes I would have known his voice if I had not seen his face. I told that in the hearing of the defendant, that I would have known his voice if I had not seen his face.

The DISTRICT ATTORNEY. Please state if after that you went to the place where your son was buried.

A. I took the next train that night; that was in the evening.

Q. You took the midnight train?

A. Yes, sir; for Wilburton.

Q. When was it you were here?

A. On the 6th day of January.

Q. When you left here you went where?

A. To Wilburton.

Q. Please state if you had your son disinterred.

A. Yes, sir.

Q. Who opened up the place?

A. Mr. Fillipo and Parson Adamson, and, I think, Mr. Neal was along, and there was several, I don't know who they were.

Q. State what occurred there at the grave.

A. We all went there to the grave——

Mr. HODGES (of counsel for the defendant). Was the defendant there?

The DISTRICT ATTORNEY. No.

The COURT. The witness may state what they did there.

110 The DISTRICT ATTORNEY. Were the bodies disinterred?

A. Yes, sir; the dirt was thrown out of the graves, and we opened the grave of Vandevere first, the box that he was in, and I told the men that were present——

The DISTRICT ATTORNEY. Never mind that.

The COURT. I think that is competent. You can state as a fact, if you identified them.

A. I identified them; I identified the first one as Ed. Vandevere, and I told them so. Well, we opened the box of the other one, and——

The DISTRICT ATTORNEY. Who did you find there?

A. I found my boy.

Q. You knew him?

A. Yes, sir; I knew him; his features were perfectly natural, more than they were terribly mutilated, bruised up; but where it wasn't bruised it was natural.

Q. I suppose you brought him home, and buried him again.

A. Yes, sir; I made preparations and brought him home.

Q. See if you recognize these pants?

A. No, sir; I do not recognize them.

Q. Please state if your son owned a watch.

A. He did.

Q. Would you know the watch if you would see it?

A. Yes, sir; I gave a description of the watch before I saw it.

Q. Did he have a key for it?

A. Yes, sir.

Q. Would you know the key?

A. Yes, sir.

Q. See if that is the watch.

A. Yes, sir; that is it?

Q. Is this the key?

A. That is like the one he carried away.

Q. Do you know what kind of a pocketbook your son carried?

A. No sir; I don't remember.

Q. But the key and watch you identify?

A. Yes, sir.

111 Q. Do you know whether he had a knife?

A. He had a knife; I haven't seen the knife yet that he carried away.

Q. Please state when your son left home if he held a belt.

A. Yes, sir.

Q. Would you know it if you would see it?

A. Yes, sir.

Q. Look at the belt I now hand you.

A. Yes, sir; that is the belt.

Q. Did he wear that away with him when he left home?

A. Yes, sir.

Q. Do you think you would be able to recognize any of your son's underclothing if you were to see them?

A. Yes, sir.

Q. How do you recognize it?

A. Mat'rial, and the goods, and the way it is made up. It is home-made.

Q. Just come to this valise and see if you can find any of your son's clothing.

(Witness steps to valise and examines its contents.)

A. There is a pair of drawers that were made by my wife.

Q. How do you know it?

A. I know it by the clothing and the way they are made; I have some on just like that; we always buy the goods and have them made.

Q. Do you recognize anything but the drawers as the clothing that belonged to your son?

A. No, sir; there is nothing that I recognize.

(The drawers are here introduced in evidence.)

A. These drawers that I have on were made at the same time; he had two pairs made of the same goods, and I had two pair made at the same time.

Q. You recognize nothing else in this valise?

A. No, sir.

Q. Where did the defendant live when you knew him?

112 A. He was supposed to live with his father at Eureka Springs.

Q. Did you know the horses and wagon?

A. There was only one horse that I knew.

Q. What one was that?

A. The bald-face horse.

Q. Who did it belong to?

A. Ed. Vandevere.

Q. Did you see that after the killing?

A. Yes, sir.

Q. Where did you see it?

A. At Wilburton or just beyond.

Q. Who had it?

A. Mr. Flippo had it in his charge.

Q. You knew it, did you?

A. Yes, sir; I knew the horse.

Q. Did you know the wagon?

A. Yes, sir.

Q. Who did the wagon belong to?

A. Ed. Vandevere.

Q. One of the man who was killed?

A. Yes, sir.

Q. Did you observe any marks on the wagon by which you could identify it?

A. Nothing more than a little printing on one side and just the looks of the wagon; it was just such a wagon as Ed brought away; if I had been sworn to the wagon I would have sworn, to the best of my knowledge, it was the wagon.

Q. Do you know H. Caldwell?

A. No, sir; there is such a man at Eureka Springs, but I don't know him.

Q. Did you observe anything else about the wagon?

A. No, sir; not that I recollect of.

Q. Did you see Mr. Caldwell's name on the back part of the wagon?

A. Yes, sir; wrote with just a marking brush.

Q. You have no doubt about that being your son?

A. No, sir; I know it was my son; there is no doubt in my mind, or nothing like it.

Q. Did you ever see Pointer any more out of jail or at the jail until he was brought out?

A. I saw him here in February.

113 Q. Did you have any more talk with him?

A. No, sir; not until I was down here in February.

Q. You do not know, of your own knowledge, when they left—your son and Vandevere—whether the defendant left with them?

A. No, sir.

Q. Did you ever see him at Eureka Springs any more after your son and Vandevere left?

A. No, sir.

Q. Your name is Bolding?

A. Yes, sir.

The COURT. Was your son a white man?

A. Yes, sir.

The DISTRICT ATTORNEY. This defendant, John Pointer, is a white man and not an Indian?

A. Yes, sir.

Q. Your son and Mr. Vandevere were both white men?

A. Yes, sir.

The COURT. Was he raised at Eureka?

A. He has been there, it will be four years this coming August.

The DISTRICT ATTORNEY. Where did you come from?

A. I am from Georgia; I have been in Arkansas last January was 9 years.

Q. Brought your son with you here?

A. Yes, sir; we lived at Harrison until last August was three years ago, when we came from Harrison down to Eureka Springs.

Q. Did you observe how he was dressed when you saw him in jail—the defendant; you don't know anything about that, I guess?

A. No, sir; I don't.

Q. What was the name of your son in full?

A. William D. Bolding.

(Cross-examination waived.)

114 WILLIAM R. VANDEVERE, having been duly sworn upon behalf of the Government, was examined by the district attorney, Mr. William H. H. Clayton, and testified as follows, to wit:

Question. Did you know Ed. Vandivere in his lifetime?

Answer. A. Yes, sir.

Q. What was his name in full?

A. Samuel Edward Vandevere.

Q. He is the one they call Ed.?
A. Yes, sir.
Q. What relation was he of yours?
A. He was a son of mine.
Q. What was his age?
A. He was 27 years old the 25th of last July?
Q. Was he a white man or an Indian?
A. White man.
Q. Please state if he had anything the matter with him; if he was a sound, hearty man.
A. He was paralyzed with fever when he was small.
Q. Which side?
A. His left side.
Q. Please state if he was lame.
A. Yes, sir; he could not walk at all without a crutch. He was helpless without a crutch, and he usually carried a stick in his hand.
Q. Please state if these are the sticks he used.
A. Yes, sir; he used that hickory stick a good long while. He generally carried two; when he dropped his crutch or anything off of his wagon he had to crawl until he got to his crutch.
Q. Where did he live the year before his death, before he was killed?
A. He left my house on the 26th of December last, I think, was a year ago and went to Eureka Springs.
Q. You live where?
A. In Wise County, Texas.
115 Q. He left your home last December, did you say?
A. Yes, sir; 26th of last December was a year ago, to go to Eureka Springs.
Q. Please state if he returned.
A. He returned there on the 11th of October last.
Q. Did anybody come with him?
A. Yes, sir.
Q. Who?
A. My son, William Vandevere.
Q. What day did they come there?
A. On Sunday, the 11th of October.
Q. Did any one else come with them?
A. William Bolding and John Pointer, and old man Steely, and my son's wife, William Vendevere's wife, were in the crowd. They all came there on Sunday, the 11th of October, after I buried my son on the 6th.
Q. What son was that?
A. George.
Q. What did they do at your place; how long did they remain there?
A. They all remained there some time and went to picking cotton for me; I had a pretty good crop of cotton.
Q. Did Pointer help with the rest?
A. Yes, sir; he picked cotton for me.
Q. Did he live at your place?
A. Yes, sir.
Q. How long did he remain there?

A. I could not say exactly how long, but he remained there some time; some three or four weeks, I reckon.

Q. Please state how long your sons remained with you.

A. Ed. staid until he started back to Eureka Springs, on the 15th day of December.

Q. How did he go?

A. He started back in his wagon.

Q. Anybody go with him?

A. William Bolding went with him.

Q. Where was Pointer then?

A. He left my house on the 14th to go to Decatur to see if
116 there was any money there for him, the county seat, and he returned back the morning they left; he returned back there about 11:00 o'clock, or half after 11:00, or somewheres near that.

Q. What time did your son and Mr. Bolding leave your house?

A. I didn't notice the clock; it was somewheres along about 8:00 or 9:00 o'clock.

Q. How did they go?

A. They went in a wagon with a team.

Q. What horses did they have?

A. They worked Ed's horses.

Q. Please state if it was the same horses that he brought through or others?

A. No, sir; he swapped one of his horses off, after he came out there.

Q. He brought one of the horses?

A. Yes, sir.

Q. Which horse was it that he brought through that he was taking back to Eureka?

A. The bald-face.

Q. Was that the blind one?

A. No, sir.

Q. What kind of a horse was the other?

A. The other was a blind horse.

Q. Did you know the wagon?

A. Yes, sir.

Q. Where did that come from?

A. That was the same wagon that he brought from Eureka Springs.

Q. Did you notice the wagon cover?

A. Yes, sir.

Q. What kind of a cover did it have on?

A. It had on it in print: H. I. Siedel Co., produce dealers, Eureka Springs, Ark.

Q. They left there on the 15th of December?

A. Yes, sir.

Q. To go to Eureka?

A. Yes, sir.

Q. How long after they left was it before Pointer came to your house?

A. He came there about 11:00 o'clock, about half after eleven, just before dinner.

117 Q. What was his business there?

A. He had come to my son's house and went back in the field where he was cutting a load of wood; and he came to the house and left a hat that belonged to some of the boys, and got his hat, and said he was going to overtake the boys.

Q. Did you ever see anything more of him after that?

A. No, sir; not until I seen him here in the United States jail.

Q. That is after the killing?

A. Yes, sir.

Q. Did your son William start back to Eureka with the boys?

A. No, sir; he lives in a mile and a quarter of me.

Q. Please state when you first learned your son was killed?

A. The first correct news I got of it was on the 11th day of January I got a letter from Col. Yoes; I had sent letters and dispatches about it here.

Q. If you had not heard of it why did you send then?

A. I had got a Chicago Blade, a newspaper—my neighbor got a paper rnd came to my house.

Q. That is the way you got the first intimation?

A. Yes, sir.

Q. Then you telegraped here?

A. Yes, sir; I wrote and telegraphed.

Q. Please state if you heard from your son after he left?

A. I got a card from him at Stringtown on the 23rd day of December.

Q. Dated the 23rd day of December?

A. Yes, sir.

Q. Have you got that card with you?

A. No, sir.

Q. You did not bring it?

A. No, sir; my children tore it up; some of them got it and tore it up.

Q. Was it in your son's handwriting?

A. Yes, sir.

Q. Dated at Stringto'n, December 23rd?

118 A. Yes, sir; Stringto'n, Indian Territory.

Q. Do you know how far Stringto'n is from the place of the killing. and in what direction?

A. It is a southwest course, I think, from where the boys are found.

Q. Do you know whether that is on the road from your place in Wise County to Eureka Springs?

A. Yes, sir; that is the way we travel, sometimes we go around by McAlester.

Q. You do not know how far Stringto'n is from the place of the killing?

A. No, sir; some 50 or 60 miles.

Q. Do you know how far it is from McAlester to Stringto'n?

A. No, sir; I could not state.

Q. McAlester is on the M. K. & T.?

A. Yes, sir.

Q. You telegraphed and wrote to Col. Yoes; then what did you do?

A. When I got the despatch I sent another one back for a description of the horses, and then a description of the wagon, and I watched the office all the next day for news, and I got a letter from Marshal Yoes;

said it was my son and William Bolding, and for me to come at once and identify the team, and I got on the train and come to South McAlester, and then to Wilburton.

Q. When you got to Wilburton what did you find?

A. I found my son's team at Mr. Flippo's, the blind horse and the bald-face horse.

Q. I will ask you to state any peculiarity about the harness when they left home?

A. They had oil cloth over the top of the hems, but they bought that after they left home; he generally always carried that in wet weather.

Q. When you came up there did you find your son's wagons and horses?

A. Yes, sir.

Q. What became of them?

A. I sent them back home to Texas.

Q. Mr. Flippo turned them over to you, did he?

A. Yes, sir.

Q. Did you describe them before you saw them?

A. Yes, sir; I described them at Wilburton.

Q. Did you have your son taken back?

A. Yes, sir.

Q. Was it your son?

A. Yes, sir.

Q. You identified him?

A. Yes, sir.

Q. You took him home and buried him?

A. Yes, sir.

Q. That was your son Samuel E. Vandevere?

A. Yes, sir.

Q. How long had he been a cripple?

A. He had been a cripple ever since he was about three years old; I toted the child to school back and forth, and he worked—he crawled on his hands and knees—and got that wagon and team; crawled on his knees, and tied his crutch to the sack; that is the way he got that team.

Q. He was not a married man?

A. No, sir; never had been married.

Q. You say that he had a crutch; do you know anything about how the crutch was fixed with regard to the metal that was on it?

A. I have an old crutch home that is just exactly like that one he took with him; he bought him a new one just awhile before he left there, and there was a piece through here to hold to.

Q. Did he have any bands upon it of any kind?

A. Yes, sir; he had some bands upon it, but I would not be able to state whether that was iron or not.

Q. Do you know whether he had a bracelet, or not?

A. Yes, sir; he had a bracelet something like that one there that he had had for three years.

Q. Where did he get it?

A. Fort Worth.

Q. Do you know who he got it from?

A. No, sir.

Q. From some young lady?

A. Yes, sir.

120 Q. Could you identify that as being it? You have seen it before?

A. Yes, sir.

Q. You say this the bracelet?

A. Yes, sir; it was broken sort of when he left home.

Q. Do you know how he carried it?

A. No, sir; he generally sometimes had it in his pocket.

Q. Do you know what kind of a pocketbook he carried?

A. He had a leather purse with three pockets or two pockets. It was one with jaws a good deal like them there, but I don't know.

Q. What was that team and wagon worth?

A. Well, he had been offered $100.00 time and again for the bald-face horse; lots of men would have given him $100.00, but he would not take it; had been offered that at Fort Worth. I offered him $100.00 myself for it.

Q. It was worth that, was it?

A. Yes, sir.

Q. What was the other one worth?

A. It was a blind horse; I reckon it was worth $25.00 or $20.00.

Q. What was the wagon worth, including the sheet and harness?

A. I suppose about 25 or 30; somewheres along there.

Q. You saw Pointer in the jail?

A. Yes, sir.

Q. Did you have any conversation with him there?

A. I spoke a few words to him.

Q. What did you say to him?

A. Well, as well as I recollect I asked him if he knew me, and he said Mr. Vandivere. As well as I recollect that was about the way it was.

Q. That was a good while after Mr. Bolding had seen him?

A. Yes, sir.

121 Q. Did you say anything to him about the boys?

A. I asked him where he left the boys; and he said he didn't leave them; they left him.

Q. Did he say where?

A. No, sir; I didn't ask him; he said they left him.

Q. Did you notice the clothing that he had on at that time?

A. Yes, sir; I noticed the pair of pants that he had on.

Q. What kind were they?

A. They were a kind of a light cream colored pair.

Q. Did you know them?

A. I thought I knew them; I don't think any man in Fort Worth could make me believe but what they were William Bolding's pants.

Q. Look at this (exhibiting pants to witness).

A. That is sewed with black thread; my wife sewed it, and she sewed it with black thread here.

Q. Do you say these are the ones?

A. Yes, sir.

Q. Did you ever have these in your hands before?

A. No, sir; not since William Bolding had them.

Q. Please examine this valise and see if there is any clothing in there you recognize.

(Witness does as requested).

A. These are my son's drawers.

Q. How do you know?

A. I know by these strings here; they are cut off at the selvedge side and put on there. And there was one pair that had no eyeholes here, and one pair that has eyeholes here. My wife made them. My wife washed them, and hadn't ironed them. She said she didn't have time to iron them, and they said it didn't make any difference.

Q. They have been washed and unironed?

122 A. Yes, sir; these are my son's pants, too; I went to Fort Worth and he bought a new pair, and they are patched on the knees, if you will look there. I am satisfied they are his pants.

Q. He was lame?

A. Yes, sir; he could not walk with his foot on the ground at all.

Q. Who patched them?

A. My wife patched them; I was setting by her when she patched them.

The DISTRICT ATTORNEY. I now introduce in evidence the things identified by this witness.

The WITNESS. That valise is John Pointer's valise; he started out from our house and he said Ed. could have it, he didn't want it any more, and he gave it to him when he left my house, and when the boys started off they put their clothes in it.

Q. John Pointer gave the valise to your son?

A. Yes, sir; he said he was hired to feed cattle out West by a man named Longley, and he gave the valise to Ed. when he started off, and they started with the valise in the wagon with the clo'*se* in it.

Q. Do you know the Longley's first name that he told you he had hired to feed cattle?

A. No, sir.

Q. Did you know Longley?

A. No, sir.

Q. How long before this killing was it that he told you that he had hired to herd cattle for Longley?

A. A good long while.

Q. Do you know of Mr. Bolding having anything except the clothing you have made? Do you know of his having a belt?

A. He had a belt and wore it part of the time.

Q. Would you know it if you were to see it?

A. I could not say, there are so many belts; I never handled the belt.

Q. Do you know anything about your son having a harp, and his knife; do you know anything about that?

A. He had an old knife.

123 Q. Would you know it?

A. Well, I can not say that I would. I don't know whether I would know the knife or not.

(Witness is here handed a knife and examines it.)

A. I could not say whether that is the knife or not.

Q. Do you know anything about this harp?

A. He sometimes had a harp in his pocket.

Q. You do not know whether he did at that time or not?

A. No, sir.

Q. Did he play the harp?

A. He played it once in awhile; he wasn't much of a hand to play, but he had one.

Q. You found him buried at Wilburton, and you took him home and buried him there?

A. Yes, sir; I buried him in the cemetery.

Q. Were there any other people recognized him but you?

A. Yes, sir; all that knew him and saw him when he was brought home recognized him.

Cross-examination by Mr. J. C. HODGES:

Question. You say these parties when they came down from Eureka Springs stopped at your house and picked cotton three or four weeks?

A. Yes, sir; they were picking there; I don't know how long; they were picking there sometime.

Q. Until up sometime in November?

A. Yes, sir.

Q. John Pointer was there picking cotton with the balance of them?

A. Yes, sir.

Q. I will ask you now whether or not your son and John Pointer were particular friends?

124 A. They were all friends as far as I ever knew; I never heard of any disturbance.

Q. Don't you know that old man Pointer furnished money to your sons and one of your son's wifes to come to your place with?

A. Ed. told me that Mr. Pointer told him that he would furnish the money to pay his way to Texas.

Q. Anyway, you understood that the money came from old man Pointer to come out there?

A. Yes, sir; old man Pointer.

Q. Do you know whether young Pointer had any money when he came there?

A. Yes, sir; he had several dollars; I didn't see the money, but then he went to Springton and bought a saddle and paid $30.00 for it, and bought a pair of blankets.

Q. When he left?

A. Yes; to go out West; he went to Decatur awhile, and went West and came back.

Q. I understand that on the 15th day of December, in the morning, or some time in the early part of the day, your son and Bolding left in a wagon, started back to Eureka Springs in the manner you have described?

A. They left on the morning of the 15th of December.

Q. I want to ask you whether at that time, if you know, Bolding had these pants or John Pointer had them?

A. Bolding had the pants; he had bought them at a little town a mile and a half of me.

Q. Did he buy them after John Pointer left?

A. He had them a few days before he left there; William Bolding bought them; they were rather small for him, and he busted them in here,

and here behind, and my wife said she would sew them up, and she did; and she said, "I haven't got any white thread and I will have to sew them up with black thread."

125 Q. You don't know whether he had them in the grip or not when they left there, or whether he had them on?

A. He had the pants on when he left my house.

Q. When he left your house he had on the pants you identify here?

A. Yes, sir.

Q. That was on the 15th day of December, 1891?

A. Yes, sir.

Q. It was about 11:00 o'clock that John Pointer came to your house?

A. Yes, sir; about 11:00 o'clock, or right about that time; I never noticed the clock at all; my wife went to getting dinner shortly after he left.

Q. You informed him that the boys had started to Eureka Springs?

A. Yes, sir; he came into the house in a might' big hurry, and I asked him if he got his money, and he said, no; and he throwed the hat he had on on the bed and got his hat, and he said that he would overtake the boys; said he would overtake them that evening or that night.

Q. Your son William went a piece with them?

A. He had to go out to the lane; it is a couple of hundred yards out to where he went out to the lane, and the road goes right on that the boys went, and he had to go down to this house, go down that way to where he did, my son William.

Q. You heard nothing more except a letter you got from your son written on the 22d?

A. No, sir; not until after I got the news in the paper.

Redirect examination:

The DISTRICT ATTORNEY. Did they have an ax with them when they left?

A. Yes, sir; I got them an ax; they was short of money, and

126 I said, "Here is an ax that will do you to cut wood on the road if you get a new handle." They went and put a handle in it.

Q. Would you know the ax?

A. Yes, sir.

Q. How would you know it?

A. The ax was an old ax with a new handle in it, with a piece broke out of the eye.

Q. Examine this ax I now hand you, and see if it is the ax they started off with.

A. Yes, sir; that is the ax.

Q. That has the piece there you speak of being broke out?

A. Yes, sir.

(Witness excused.)

127 WILLIAM B. PAPE, having been duly sworn on behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. You are the United States jailor at this place?

A. Yes, sir.

Q. Do you know this defendant?

A. Yes, sir.

Q. Please state when he was turned over to you and by whom.

A. He was brought in here by Tom Shleburn on the 28th of December.

Q. Please state if you inquired of him his name.

A. Yes, sir.

Q. What name did he give you?

A. George L. Longley.

Q. Did you write it or did he write it himself?

A. I wrote it myself.

Q. That paper you have in your hand is your description, is it, giving his name?

A. Yes, sir.

Q. How long was it before you learned his right name?

A. It was some time after that. There was a man named Brown came down here from Eureka Springs that I think was sent down here——

Q. Brown came there and afterwards you found out his name?

A. Yes, sir; Mr. Brown told me himself who he was.

Q. Up to that time he had never told you his name was Pointer?

A. No, sir.

Q. Do you know Mr. Bolding?

A. Yes, sir.

Q. Were you present when he went in to see the defendant?

A. Yes, sir.

Q. Please state what name he gave them, what name he was going by at that time.

A. By the name of George Langley. He is called George Langley over there in the jail now. Mr. Bolding came in and Mr. Yoes was with him, and Mr. Yoes asked me to bring Langley out in the consultation
128 room, and I did so, and as he walked from the jail into the consultation room Mr. Bolding said, "That is John Pointer," and Pointer turned around like he was talking to me, and said, "Who is that man?" and Bolding said, "You know who I am, sir," and commenced crying, and sat down in a chair, and Pointer asked me again who that man was, and I turned around and took him and put him back in jail, and that was all the conversation that took place at that time.

Q. Please state if the defendant had anything that you took from his person.

A. He had a watch I took from him when I searched him.

Q. Examine those and see if these are the articles that you took from him.

A. Yes, sir; they look like the same.

Q. They were turned over by you to me?

A. Yes, sir; I have had them in my safe, locked up in a combination safe.

Q. Was the defendant dressed in the same clothing he has got now when he was brought in?

A. No, sir.

Q. Would you know the pants that he wore if you would see them?

A. Yes, sir.

Q. When did you send them to me?

A. I brought them to you yesterday afternoon.
Q. See if these are the pants.
A. They look like the same pants.
Q. When did you take them from him?
A. I took them from him yesterday afternoon.
Q. Had he been wearing them up to yesterday afternoon?
A. Yes, sir; it was yesterday morning, I think, that he put on a new suit of clothes and took these pants off.

129 Q. That is all right for him to put on a new suit of clothes, but these are the pants he has been wearing ever since he has been in jail?
A. Yes, sir.
(Pants referred to are marked Exhibit A.)
Q. You say that his name appears on your rolls?
A. Yes, sir; on the 28th day of December, as George L. Longley.
The COURT. You put that down after he gave you the name?
A. Yes, sir; I was standing right by him when he gave it to me.

Cross-examination:

Mr. HODGES. You say when Mr. Bolding came in Pointer asked you who that man was, and Mr. Bolding commenced crying?
A. Yes, sir.
Q. Did he put his handkerchief up over his face?
A. I don't know that he had his handkerchief, but he put his hand up.
Q. And the boy asked the second time of you who that boy was, and you took him back to jail?
A. Yes, sir.
Q. The light isn't very good in that consultation room, is it?
A. About that time of day it is pretty good.
Q. Ain't it pretty difficult to see to read in that consultation room?
A. Not along at noon time; it was just after 'oon that Mr. Bolding and Mr. Yoes came there to the jail. On rainy days, when it is cloudy, it is a little difficult to see in there, and we frequently have to light a lamp, especially in the afternoon.
(Witness excused.)

It is admitted by counsel for defendant that the valise, together with its contents, heretofore introduced in evidence, is the valise which was in the possession of the defendant at the time he was arrested.

130 WILLIAM J. VANDIVEER, being called and duly sworn on behalf of the Government, and being examined by the district attorney, testified as follows, to wit:
Q. You are the son of Samuel R. Vandiveer, are you not?
A. Yes, sir.
Q. Did you know Mr. Samuel E. Vandiveer?
A. Yes, sir.
Q. He went by the name of Ed.?
A. Yes, sir.
Q. Was he a brother of yours?
A. Yes, sir.

Q. Where did you live just prior to October, 1891?
A. I staid at Eureka Springs.
Q. Where did your brother live?
A. He lived with me at Eureka Springs.
Q. How long had he and you lived there?
A. We got there the 15th day of January, 1891, from Texas.
Q. Your home was in Texas?
A. Had been; yes, sir.
Q. Are you a married man?
A. Yes, sir.
Q. Your brother was not?
A. No, sir.
Q. Please state if you left Eureka Springs and went to Texas?
A. Yes, sir; I left there the 22d or 23rd day of September, 1891. We started to go to Texas.
Q. Who started with you?
A. My wife and William Bolding and my brother left Eureka Springs together.
Q. What was your brother's name?
A. My brother, Ed.
Q. Do you know John Pointer?
A. Yes, sir.
Q. Did you know him prior to that time?
A. Yes, sir.
Q. How long had you known him?
A. I have been acquainted with John, I reckon, some seven or eight years.
131 Q. Please state if you had any understanding as to who was to go with you.
A. Yes, sir; he was to go with my brother. I wasn't aiming to go in the first start when they began to talk about going; I didn't want my brother to go, but he was going to go anyhow and I went with him.
Q. Do you of your own personal knowledge know anything about the arrangements?
A. Only what my brother Ed. told me himself.
Q. You didn't hear anything at all?
A. No, sir.
Q. Please state how you left Eureka Springs.
A. I left in a wagon; I had a wagon and my brother Ed. had a wagon and team.
Q. What wagon and team did your brother have?
A. He had a pair of bay horses when we left there.
Q. What kind of horses?
A. Bald horse and bay horse that he worked from Eureka Springs to Texas; he swapped him off for another bay horse, blind horse.
Q. You and your wife went in one wagon and your brother Ed. went in another.
A. Yes, sir; and William Bolding went with him.
Q. Please state if you got in company with this defendant anywhere, and, if so, where?
A. About 12 miles south of Eureka Springs, at Talens.

Q. Who did you see there?
A. Mr. Pointer and John Pointer.
Q. His father was with him?
A. Yes, sir.
Q. Where does his father live?
A. At Eureka Springs; 12 miles away from the Springs.
Q. What was done there?
A. John was going on to Texas with us, he said.
Q. Whose wagon did he get in?
132 A. He didn't get in any wagon; he was horseback; he went on ahead of us on his horse.
Q. What day was that?
A. That was the second day; we camped at Mr. Talens the night we left Eureka Springs, the 22d; I wasn't say for certain; it was either the 22d or 23rd, but we camped at Mr. Talens' house that night.
Q. Did you know you were going to meet him there?
A. My brother told me we were, and that is all I know about it.
Q. How long had it been since you had seen him?
A. I could not say for certain; sometime in the latter part of June, though, I think it was, and that was September.
Q. What time in the day did you leave there?
A. We didn't leave very early; it must have been somewhere near eight o'clock or nine.
Q. Then you went through to Texas?
A. Yes, sir.
Q. Did Pointer go clear through with you?
A. Yes, sir.
Q. Was he riding his horse all the time?
A. No, sir; rode in the wagon sometimes.
Q. What route did you go?
A. We come to Fort Smith, passed right along this road by the court-house here, crossed this iron toll bridge up here, and went right straight to McAlester.
Q. You didn't go by String Town?
A. No, sir; from McAlester to Denison, and to Sherman, Belle Point, and across towards Benton to Rome, and from there to my father's.
Q. Have you been to the place where this killing occurred since?
A. No, sir; only passed it on the train. We came right along that road when we went through there before, me and my brother.
Q. What is the distance from String Town to where this killin' occurred?
A. I could not say.
133 Q. You can go by the Stringtown road, or by McAlester?
A. Yes, sir; it is called nearer across there, and that is how we coke to go across there.
Q. What time did you get to Texas?
A. The 11th day of October.
Q. How long did you remain there?
A. I have been there ever since.
Q. When did your brother leave there?
A. The morning of the 15th of December.

Q. To go where?
A. Eureka Springs.
Q. Who went with him, if anybody?
A. William Bolding and he went together.
Q. Were you at home when they left?
A. I was standing on the chip pile when they drove off.
Q. Did you see Pointer that day?
A. Yes, sir.
Q. What time?
A. He came to the back of the field where I was hauling wood, about eleven o'clock, and asked me where the boys was, and I told him they had started back, and he said he wanted to go with them, and asked me which way they went, and he asked me if Ed had went and got his money the day before where we had been hauling cotton seed, and I told him yes, and something was said about his having to go through Aurora to get his check cashed, and I told him Wilkerson had went that day to get my part. $30.20 was the check.
Q. How much did you have in the check?
A. Between twelve and fifteen dollars, somewhere.
Q. The rest of it was your brother Ed's?
A. And Wilkerson went along as far as Aurora to bring my money back with him.
Q. What did he say as to whether he was going with them?
134 A. He went to turn off and I said, "I am going to the house and you can ride with me," and he got on the wagon and run down to my father's; I lived about a quarter of my father's, and he said, "Wait, I am going to go to get a hat. He was wearing Wilkerson's hat, and he went in the house and got his hat and was out in a few moments and rode on with me a couple of hundred yards until I turned off, and he said he was going to catch the boys, and would go with them to Sherman and see his lawyer.
Q. Did you see anything more of him after that?
A. No, sir; not until I saw him in jail.
Q. Did you ever see your brother?
A. They brought him back to String Town dead.
Q. Did you recognize him?
A. Yes, sir; he looked as natural as he ever did.
Q. What horses did your brother and Mr. Bolding start off with?
A. A bald faced bay horse branded "J. B" on his right shoulder, and a sort of a pony, a blind bay horse, smaller than the bay horse, and he had a big Spanish brand on him.
Q. What wagon did they have?
A. He had a nine-foot wagon, what we call a California brake.
Q. Where did he get it?
A. From old man Caldwell; swopped with him at Eureka Springs.
Q. Did it have his name on it?
A. Not that I know of; had on each side of it, though, "Our own make," brand new wagon sheets, marked "Seidel & Co." We bought it the day we left Eureka Springs.
Q. Did they have an ax with them?
A. Yes, sir.

Q. Do you know it?

A. Yes, sir; I helped burn the handle out of it to put a new one
135 in; it had a niche broken out of the side of it.

Q. Look at this one and see if this is the ax?

A. Yes, sir; William Bolding bought the handle that went in the ax.

Q. Do you know anything about a bracelet that your brother wore or carried?

A. He had one that he had had for two or three years that he carried in his pocket.

Q. Do you know where he got it?

A. He said he got it down to Fort Worth.

Q. Would you know it?

A. I could not say for certain. It was just exactly like the one you have there; I could not swear this was it, but it is just exactly like it.

Q. What kind of a pocketbook did your brother have?

A. It opened in three places, had three pockets in it; he carried it two years or over.

Q. It had three places in it to put money?

A. Yes, sir.

Q. This rim I show you would be a rim of a pocketbook having three compartments?

A. Yes, sir.

Q. Do you know anything about a crutch and the canes that he carried?

A. Yes, sir; he had a right new crutch, and he had a hickory cane and an umbrella cane; part of an umbrella that he carried.

Q. Are the canes I show you his canes?

A. Yes, sir; I know both of them; these are the canes.

Q. Your brother was a lame man?

A. Yes, sir.

Q. Was he older than you?

A. No, sir; he was younger.

Q. Your brother was older than Bolding, wasn't, he?

A. Yes, sir.

Q. Bolding was only a boy?

A. Yes, sir.

Q. Do you know Bolding's belt, or did you ever see him with it?

A. Yes, sir, I have seen him wear it; my brother wore it around
136 there.

Q. Is this is?

A. Yes, sir; it is exactly like that belt that he had there at our house.

Q. Did Pointer have a belt?

A. No, sir; *bonody* else had a belt but Will.

Q. Do you know Will Bolding's watch?

A. Yes, sir; I can tell you how it was as near as I know about it.

Q. How do you know it?

A. It has got a dent in the back that Will told me he done by lifting; he used to drive a transfer team; it was an open face silver watch.

Q. Does the watch I now hand you look like it?

A. Yes, sir; it looks just like the watch.

Q. You know anything about this strap?

A. That is a strap my brother had in his pocket when he left; somebody gave it to him, I could not say who, but he had just such a strap as that in his pocket when he left home.

Q. Do you know the kind of a watch key that Will had?

A. No, sir; I could not say as to the watch key.

Q. Would you know your brother's knife?

A. No, sir; I could not say as to the knife; Ed had so many knives that I could not say.

Q. You did not go up in the Indian country to help get your brother's body, did you?

A. No, sir; I was going to go, but a cousin of mine told my father he would go with him and I staid at home to tend to the stock and things while they were gone.

Q. The deceased and the defendant were all white men?

A. Yes, sir.

137 Cross-examination by Mr. HODGES:

Q. What time did you leave Eureka to go to Texas?

A. The 22 or 23 of September, I would not say positive, of 1891.

Q. What time did you get to your father's?

A. The 11th of October.

Q. In going out to Texas, the defendant Pointer always rode in Ed's wagon?

A. I didn't say he did all the time; part of the time he did, and part of the time he rode his horse.

Q. When he rode in the wagon he rode with Ed?

A. Yes, sir.

Q. I will ask you if it is not a fact within your knowledge that John Pointer and Ed. Vandiveer were very intimate friends, and had been for years?

A. They were raised up together; John and all of us got along all right.

Q. Don't you know that they were very intimate?

A. I can't say any more than any one else.

Q. Wasn't John and Ed more intimate than you and Ed?

A. No, sir; I don't think he loved him better, or he wouldn't have done the deed that he did.

Q. Then you were all as good friends as could be, were you?

A. Yes, sir, we were all friends; I can't say that I would have done any more for John than any one else; we were friends, and that is all.

Q. Who furnished the expense money for you to go to Texas?

A. There is the question.

Q. Answer what you know about it.

A. They were to pay Ed's way to get Ed out there.

Q. Do you know what was actually done on the road?

138 A. I got some money from John.

Q. Then you did get money from John Pointer on the road?

A. Yes, sir.

Q. How much did you get from ?

A. Seven dollars and a quarter.

Q. That was expense money as you went along?

A. Yes, sir.

Q. When you got there you picked cotton together?
A. Yes, sir.
Q. The boys seemed good friends all the time?
A. Yes, sir.
Q. That day when Pointer came to you and asked you where the boys were you told him they had started back to Arkansas?
A. Yes, sir.
Q. What place was it you told him they had to go to get this check cashed?
A. He asked me if they had got the check and I told him yes, he had got it the day before, and had to get it cashed at this place, at Aurora.
Q. What did you say the check was for?
A. $30.30.
Q. What was that for?
A. For cotton seed; me and my brother had hauled seed.
Q. How much was that man to bring back to you?
A. Something between ten and eleven dollars.
Q. Don't you know how much it was?
A. No, sir; I could not swear positively what it was.
Q. How do you know it was just thirty dollars and thirty cents?
A. I just recollect the check.
Q. Did you sell the seed?
A. Yes, sir.
Q. Don't you know how much you got out of it?
A. I could not say just exactly.
Q. Do you know whether Ed or some of the balance of you paid the defendant some money just before he left there?
A. Yes, sir.
139 Q. How much?
A. I gave him five dollars, me and Ed together.
Q. How long was that before?
A. That was when he w'nt up to Decatur to see about this trouble he was in up there.
Q. How many days before?
A. It was only two days; he left one day, and the night before that was when we gave him the money.
(Witness excused.)

140 W. G. BEARD, having been recalled on behalf of the Government, and being examined by the district attorney, testified as follows, to wit:

Q. Please state how far it is from Wilburton to Stringtown.
A. Sixty miles.
Q. How far is it from Stringtown to the place of the killing?
A. It would be about fifty-six miles.
Q. Please state if Stringtown is on the road to Texas from that place.
A. Yes, sir; Stringtown is on what we would call the Fort Smith and Boggy Depot road.
Q. You go right through there in going to Texas?
(Witness excused.)

141 JAMES WILKERSON, having been sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Q. Where do you live?

A. In Texas.

Q. Please state if you live with Mr. Vandiveer.

A. Yes, sir; I lived with him last fall.

Q. Did you know William Bolding and Ed Vandiveer?

A. Yes, sir.

Q. Please state if you were there, or went any part of the way with them when they left Texas in December last to go to Eureka Springs?

A. Yes, sir; I went with them about eight miles.

Q. To what place?

A. To Aurora. I went over there to bring some money back for Mr. Vandiveer's son, who was just on the stand.

Q. How did you got ?

A. I went in a wagon with the boys, and led my horse, and rode my horse back.

Q. Was there anybody in the wagon with Ed and Will as you went over there?

A. No, sir; no one bust just us three.

Q. What time in the day did you leave them at Aurora?

A. It was just about two o'clock, I guess, in the afternoon.

Q. What were they doing then?

A. The last time I seen them they were in the wagon, fixing to leave.

Q. For Eureka?

A. Yes, sir.

Q. Then you returned?

A. Yes, sir.

Q. Please state if you saw the defendant.

A. I met him about three hundred yards; between three hundred yards and a quarter of where I left the boys.

Q. Did you speak to him?

A. Yes, sir.

Q. Was he horseback or afoot?

A. Afoot.

142 Q. Where was he going?

A. He said he was going to overtake the boys, and go as far as Sherman, Texas, with them; he was going down there to see his lawyer.

Q. That was the same day they left?

A. Yes, sir.

Q. Right after you left them?

A. Yes, sir; I rode in a lope.

Q. Did you ever see anything more of Pointer until after he was arrested.

A. No, sir.

Q. You never saw anything of these boys until after they were dead?

A. No, sir.

Cross-examination by Mr. J. C. HODGES:

Q. Were you with the boys when they were picking cotton for Vandiveer?

A. Yes, sir.

Q. They were all good friends, wasn't they?

A. Yes, sir; as far as I know.

Q. How long have you known Mr. Pointer?

A. I don't remember now how long it was; it was something over two months, I reckon.

Q. You didn't know him until he came there with them?

A. No, sir; I had never seen him.

Q. How much money did you get?

A. The check was for $30.30, and I brought back eleven dollars, I think; that is my best recollection.

Q. Aurora is in Wise County, isn't it?

A. Yes, sir.

Redirect examination:

The DISTRICT ATTORNEY. Q. You brought back eleven dollars?

A. Yes, sir.

Q. Was that all for Will?

A. Yes, sir; and his father, too; his father had a little money in there.

Q. Do you know how much his father had of it?

A. I don't recollect; I think probably a dollar.

(Witness excused.)

Government rests.

143 Thereupon the Government closed its case in chief; whereupon the defendant again moved the court to require the dist. attorney to elect upon which count of the indictment he would claim a conviction of the defendant; which motion the court overruled.

Fifth. The defendant to maintain the issues on his part went upon the stand and testified as follows:

144 *Testimony introduced by the defense.*

JOHN POINTER, the defendant, having been duly sworn in his own behalf, was examined by Mr. J. C. Hodges, and testified as follows, to wit:

Question. You are the defendant in this case?

Answer. Yes, sir.

Q. Your name is John Pointer?

A. Yes, sir.

Q. How long did you know Ed. Vandevere before his death?

A. About 8 or 9 years.

Q. Where did you first know him?

A. Eureka Springs.

Q. How long had you known William Bolding?

A. About three years.

Q. Did you leave Eureka Springs with Ed. Vandevere and William Bolding in September, 1891?

A. No, sir; I did't leave the town with them.
Q. Where did you get with them?
A. About 12 miles south of town.
Q. Where did you go with them?
A. I went to Wise County, Texas.
Q. Whose house did you go to?
A. Mr. Vandevere's.
Q. Father of Ed. and William Vandevere?
A. Yes, sir.
Q. Who furnished the money to pay the expenses on that trip?
A. I furnished the money.
Q. How much money did you have when you left home?
A. $112.
Q. Did you have a horse?
A. Yes, sir; horse and saddle.
Q. What did you do after you got to Texas?
A. I went to picking cotton with the rest of the boys, at Mr. Vandevere's.

145 Q. Do you remember how long you staid at Mr. Vandevere's?
A. Some three or four weeks, I think.
Q. Where did you go to then?
A. I went about 60 miles from Decatur, northwest.
Q. What did you do there?
A. I worked on a ranch for Mr. Longley.
Q. How long did you work there?
A. I worked there four or five weeks.
Q. Did you at any time after that return back to Mr. Vandevere's, in Wise County?
A. Yes, sir.
Q. Where were you on the day before you left there to go to Arkansas, before you left there in December?
A. I was in Decatur, Texas.
Q. Do you remember the day that the boys left to go back to Arkansas?
A. Yes, sir; I do.
Q. Where were you that day?
A. The day they started I came to Mr. Vandevere's house, some two or three hours after they had started, the folks said at the house.
Q. Where did you overtake them at?
A. About 10 or 12 miles from Mr. Vandevere's house, a place they called Rome.
Q. Where did you go that night?
A. We went about 7 miles from Rome on the road towards Benton.
Q. Did you all stop in Benton as you came through?
A. Yes, sir.
Q. How long were you in Benton.
A. About two hours.
Q. Where was the next town of any size that you struck after you left Benton?
A. Sherman.
Q. You went to Sherman, and then to Denison?
A. Yes, sir.

Q. Did you go through White Rat, or Whitesboro?

A. No, sir; we left that to our left; we went to Sherman,
146 and then Denison, and crossed the bridge across Red River into the Indian Territory.

Q. Do you remember what day of the week you crossed into the Territory?

A. I don't remember the date; it was Friday or Sunday after we left.

Q. To make a long story short you and these boys travelled on together up to the place where you camped on the creek?

A. Yes, sir.

Q. Did you go to a gentleman's house named Baerd to get some hay?

A. Yes, sir; I went to his gate.

Q. Tell the jury who was in the wagon, or at the wagon, when you went to the house to see about the hay?

A. Ed Vandevere was in the wagon and Mr. Bolding and I were walking behind the wagon. Mr. Baerd came out and met me at the gate, and I asked him for hay, and he said he didn't have any hay for sale, but he sighted me to a house where I could get some hay; he said there was a creek we could camp on there and plenty of good water, and a good place to camp.

Q. Did any of your party go and get any hay?

A. Yes, sir.

Q. Who went?

A. William Bolding.

Q. Went to the gentleman's and got hay?

A. Yes, sir; he went over across the road; he said it was over 4 or 500 yards.

Q. You all camped down on that creek that night?

A. Yes, sir.

Q. You camped there just as you had been camped?

A. Yes, sir.

Q. I will ask you now if there was any trouble or difficulty between you at all that night?

A. No, sir; none whatever.

Q. Was there any the next morning?

A. Yes, sir.

Q. I want you, Mr. Pointer, to tell this jury just as near as you can what occured the next morning. First, I want to know what time of day it was when the trouble commenced?

147 A. It was just at daybreak, or just after daylight——

Q. What were you doing?

A. I was getting breakfast and William Bolding had gone to water the horses; there was no water at the camp, but he went across the road two or three hundred yards to take th' horses up there to get water; directly one of the horses came running back loose, and stopped there at the camp, and I was busy, and I didn't get up, and I just let him stand there, and Will come up and tied the other horse to the hind wheel of the wagon, and went and catched that one there and whipped him, and Ed said "Don't whip the horse that way; let me have him; I can lead him without whipping him," and he got up, picked up his crutch and cane, and went and caught hold of the rope, wound it around his hand, started to

lead the horse, got just about even with the fire, made a little pass towards the wagon, and the horse had just got even with Will when he stepped behind the horse and hit him across the haunches with a switch that he had in his hand.

Q. That is, Will hit the horse?

A. Yes, sir; the horse jumped and that throwed Ed down, jerked him down, and that seemed to scare him, and he sideled off kind of west kinding of jerking him and jumping, and Ed still held to him; he wound the rope around his hand; he could not get his hand untangled, and the horse run around the tree there and he stopped. I run out to where Ed was, and I caught hold of the horse and led him back; unloosened the rope so I could unwind it from his hand, and raised him up in a sitting position, and asked him if he was hurt, and he said "No; not much," and he said, "Bring me my crutch and cane; I am all right."

Q. He said that to you?

A. Yes, sir; I said "All right." I said to Will just as I got to the fire,
"Take Ed's crutch and cane to him, please, and I will go on and get
148 the flour and get breakfast so we can move out." I had been making up some dough; it wasn't thick enough and I went to the wagon to get some more flour. In the meantime Will went out and took Ed's crutch and cane, and I heard him say to Ed "That is the biggest fool horse I ever saw," and Ed said "You are a bigger fool than the horse; if you hadn't hit him the horse wouldn't *wouldn't* have drug me; wouldn't have done anything." I looked out of the wagon when Ed said Will was a bigger fool than the horse was; that if it hadn't been for him there wouldn't have been nothing of it. Will called Ed a liar; I suppose he was kind of angry anyway, and Ed struck Will with the cane and 'nocked him down. Will jumped up. Just as he knocked him down I got out of the wagon; I begin to get out of the wagon to start to them. Will jumped up and run back where we had been cutting wood there, and hit Ed with the axe by the tree, hit him by the side of the head. I was running; as I passed the fire I throwed the pan down. Just as Ed fell Will turned around and seen me, and I could not turn to run back, and so I run around the tree, and he started after me with the axe raised over his head, and he tripped and fell, and as he fell he dropped the axe. I fell just as he stopped, and caught hold of the axe, and he grabbed the head of the axe, and we both jumped up as quick as we could, both holding to the axe, and we struggled then and we got to the fire, and I put my foot behind him and shoved the axe just as he went to wrench it out of my hand, throwed it over that way, and as I shoved it it hit him in the neck and cut him.

Q. He had hold of the axe and you had hold of it, too?

A. Yes, sir; he had hold of the head of the axe and I had hold of the handle. He had hold of the axe and went to throw it over to
149 twist it out of my hands, I suppose, and I shoved the axe at the same time, and he jumped up and started at me and I hit him and knocked him down, and he jumped up and grabbed a chunk, and as he done it I hit him the second time.

Q. How many licks did you hit him in all?

A. Two.

Q. You think you hit two licks?

A. Yes, sir.

Q. That is your recollection, you struck him two licks?

A. Yes, sir; I think it was two licks.

Q. After the last lick what did he do?

A. The last lick seemed like he kind of started to get up, and I remember I hit him when he started to get up; I hit him three times.

Q. After you hit him the last time did he try to get up any more?

A. No, sir; he did not.

Q. Did you go to Ed after that?

A. Yes, sir.

Q. What was his condition?

A. Dead; I took him to be dead.

Q. How near was he to the bank?

A. He was probably five or six steps, maybe 7.

Q. Now, tell the jury what you did?

A. I kind of got my breath, and got over my excitement and my tired spell; I had been scuffling, and I was scared; that was the size of it. I seen I had two dead men there on my hands, and just—I didn't know what to do, and I just thought the best thing I can do is to hide as well as possible until I have time to get away.

Q. Tell what you did do?

A. So I picked Ed up under the arms, and I took him as well as I could, tried to carry him, but could not, his legs dragged, to the edge of the bank, and got his feet over so he would light on his feet, and let him down.

Q. What did you do then?

150 A. I went and took Will; I had to raise and drag him; dragged him a few steps; tried to carry him; I had him under the arms, too, and his legs dragged, and I had to stop and rest, and then I picked him up the second time and dragged him to the bank and put him over.

Q. After that what did you do?

A. I just fixed things and got away; I harnessed the team and then I thought of the axe; I thought I had better get that out of the way so they wouldn't find the axe so quick and start after me. I was so scared I didn't know which way I was going hardly, and as I was walking I seen a little tree and I just put the axe in the tree and came back where the boys were laying, and held Ed up and pulled his coat up that way, laid it under his head as well as I could, turned the collar up, and got in the wagon and started off. After I got across the branch one of the horses got scared and run out of the road.

Q. Tell the jury why you called yourself Langley, if you did do it.

A. Well, I didn't know what to do. I thinks now if they find out my right name they are sure to catch me. I have always heard since I came into Arkansas that they were hanging so many men in Fort Smith court and I knew that was in the jurisdiction of the Fort Smith court, and I was just scared and done that to cover up my trail as well as possible.

Q. You tried to sell the team, did you?

A. Yes, sir.

Q. What did you intend to sell it for?

A. I intended to sell it—I got into trouble I couldn't keep out of, and I just thinks if poor Ed was alive he wouldn't care after I got into something on his account for me to use all the means he has got to get away, and I undertook to sell it to get away.

Q. Of course you told the officers you didn't know anything about it ?

151 A. Yes, sir.

When you came up here you still claimed your name was Longley ?

A. Yes, sir.

Q. I want you to tell this jury how you happened to have on these pants, whether they were yours or Will's ?

A. They were mine ; I bought them from Will. They were too small for him and they just fitted me ; I had them on and I kept them on ; I had them on and a pair of overalls.

Q. You had them on the morning that the killing took place ?

A. Yes, sir.

Q. They had got up in the morning and dressed and all ?

A. Yes, sir.

Q. I want to know if it ever occurred to you the thought of murdering these boys for what they had ?

A. No, sir ; it had not.

Q. Had you ever had any better friend than Ed Vandevere ?

A. No, sir.

Q. Had you ever associated with any man you were more intimate with than him ?

A. I liked Ed better than anybody ; would have done more for him.

Q. You had been friends since you were boys ?

A. Yes, sir.

Q. You say at the tree there, near the tree, is where Will struck Ed with the axe ?

A. Yes, sir.

Q. I want you to tell the jury how that rock came in that pan there.

A. We had been in the habit every morning I would warm the rock and wrap it up in a peice of a quilt that we had there, a peice of sheet rather, and put it in to Ed's feet ; he could not get out to walk, and it was cold, and we would fill the pan up with water and put the rock in

152 it, and heat it that way so the rock would be wet and it would steam when we put it in the blankets and put it to his feet.

Q. This rock you had for that purpose ?

A. Yes, sir.

Q. How come you to go off and leave the pans there ?

A. I don't know ; I didn't see them ; I was excited and I didn't see them ; I didn't think about them.

Q. Now, tell the jury how you came in possession of that watch.

A. I had give Will three dollars, and he let me have the watch for security until he got the money to pay me back. He said he had a little money, but he might need more before we got through ; we thought of separating in Fort Smith.

Q. Was that in the Territory or Texas ?

A. It was right there when we camped ; after we got into the Territory ; the first night into the nation.

Q. That had been some days before ?

A. Yes, sir.

Q. This string you spoke of, or that is spoken of here by the witness, tell the jury how you got that.

A. When I was in Springtown, Texas, I bought a saddle, and he gave me an extra string or strap to hang the saddle up by.

Q. When you bought the saddle you were given that for to hang it up by?

A. Yes, sir.

Q. These canes here, they belonged to Ed., did they?

A. Yes, sir.

Q. They were in the wagon?

A. Yes, sir.

Q. Did you put them in the wagon?

A. Yes, sir; I put one in there; the other was already in there; he never used them hardly; that material was too light, wouldn't bear up enough.

Q. The other cane your put in the wagon?

A. Yes, sir.

Q. The other one was already in there?

A. Yes, sir.

153 Q. What went with the crutch?

A. Ed fell on it someway, and it was broke near the center where the hand hold was, and I put the crutch into the fire.

Cross-examination:

The DISTRICT ATTORNEY. Question. What did you burn the pocketbook for?

A. The night we camped there, before the killing occur'ed the next morning, Ed was looking over and burning some of his old letters, and he had one in his pocketbook, and he said it was the last one he had got from his girl; part of it was sticking out of the lower part of the pocketbook; the pocketbook was ripped and worn out, and he said, "My pocketbook is about gone and," he said, "I will get me another one."

Q. Did he burn that?

A. I am coming to that. He said, "I will have to get another one in the next town we strike," and he said, "It is no account anyway," and he took what money he had out, and he said, "Here is five dollars in a bill, and some chicken feed; put that in your pocket if it has not got any holes in it," and he handed it to me and threw the pocketbook in the fire.

Q. So there was a pocketbook burned there; you had all his money in your pocket?

A. Yes, sir.

Q. There was no money found in the other man's pocket; what became of that?

A. Ed and Will, what money that they had belonged to both of them; Will was furnishing half of the money, half of the feed for the team, and Ed he carried the money; Will, I don't think he had any pocket-

154 book; when he carried money he carried a purse or tobacco sack.

Q. How old are you?

A. I passed my 19th birthday in jail.

Q. What did you leave Eureka Springs for?

(Objected to.)

Q. I will ask you the direct question. Were you not charged with horse-stealing in Missouri?

(Objected to.)

The DISTRICT ATTORNEY. I think I have a right to subject this defendant as a witness to the same tests that any other witness is subjected to. He comes upon the stand in this instance not as a defendant, but as a witness. Now, if he is a witness here any question that might be asked for the purpose of impeaching the witness, or anything that would go to discredit him as a witness is proper. Any question that could be asked any other witness can be asked him. The law when it gives to a defendant, a man charged with a crime, the right to go upon the stand, does not give him rights over other witnesses. He is subjected to the same kind of cross-examination that any other witness would be subjected to. If he has been charged with a crime, if he has been convicted of a crime, of he belongs to the criminal class, you have a right to find that out upon cross-examination.

The COURT. I do not think there is any question about the right on cross-examination to ask a witness a question of that kind. I do not understand that the law giving a defendant the right to testify so far lifted him above ordinary witnesses who are not charged with crime that he is not required to answer the same sort of questions that you can put to an ordinary witness; and the question is only relevant, only appro-
155 priate, as affecting his truthfulness as a witness. It is not competent upon the ground, and is not offered to the jury that they make take it into consideration upon the theory because he might be charged with another crime he might do this one; they can not consider it in that way. His statements go to the jury, and they have the same right to weigh them under the same rules that they would weigh the statements of any other witness precisely, and upon that ground I think it is admissible.

Mr. HODGES (of counsel for defendant). The point we make is, what you can not prove directly you can not prove indirectly.

The COURT. You can prove this either directly or indirectly as affecting his credibility as a witness.

(Defendant excepts.)

The DISTRICT ATTORNEY. What did you leave Eureka Springs for and go to Texas?

A. I left Eureka Springs to go to Texas because I thought it was a newer country and I could do better there than I could at home.

Q. Is that the only reason?

A. No, sir.

Q. Give us the other reason.

A. And at one time—I will answer your question now—and at one time I had been charged with horse-stealing, and proved myself clear beyond a doubt.

Q. Was that the reason you left Eureka Springs?

A. No, sir.

Q. What other reason?

A. I gave you two, and that is all.

Q. You gave me two; one was that Texas was a better country, and the other was you had been charged with horse-stealing?

A. Of course a fellow can not do as well where there has been at anytime anything brought against him.

Q. You were charged with horse-stealing in Missouri, were you not?

156 A. You can speak it either at Eureka or Missouri. At Eureka is where the trial was held.

Q. You were charged with stealing horses in Missouri?

A. That is where they said.

Q. You were not taken up to Missouri and tried?

A. No, sir; the witnesses were brought over there to Arkansas.

Q. Do you know whether there is a requisition from the governor of Missouri to the governor of Arkansas for you now?

Mr. HODGES (of counsel for defendant). I submit that is not competent. I don't know whether it is true or not, but I say it is not competent evidence. The requisition is a document and proves itself.

The DISTRICT ATTORNEY. I will not press the question. [To the witness.] I will ask you when it was you were charged with horse-stealing in Missouri?

A. The first I knew of the charge it was in Aug'st sometime.

Q. Why did you and your father go out 12 miles out of Eureka instead of going with the boys from Eureka Springs?

A. I had been out there and passed by there going home to Eureka, and see my father there and stopped there.

Q. Saw him where?

A. At Mr. Tallen's, ten or 12 miles south of Eureka.

Q. Had you been at Eureka?

A. No, sir.

Q. Had you been there for six months?

A. Yes, sir.

Q. When were you there last?

A. I was there in August.

Q. You left in September?

A. No, sir; I didn't leave in September.

Q. When, then, did you leave, going to Texas with these boys?

A. I think it was the last day of August.

157 Q. Now, why did your father meet you so far out there?

A. I didn't know he was there or he didn't know I was there.

Q. How come you to meet there?

A. They were old friends to myself and father, and he was there and I stopped in.

Q. You say there was no understanding between you and Ed., or your father and Ed. that you should go with him?

A. While I was doing in Texas I wrote a letter to father; something in it to Ed., and he gave the part that was to Ed., to him.

Q. You have given a reason why you left Eureka Springs; why did you leave Texas to go back?

A. Because the boys were going, and I thought I would go back with them to see the boys at home.

Q. You got into some trouble down there, and had a lawyer employed; what was that for?

A. If you want to know, he had a mortgage of $35.00 on my horse and saddle.

Q. The lawyer had?

A. Yes, sir.

Q. You got into some trouble, and that was for a fee, I suppose. What was the trouble you were in there?

A. I was charged with carrying a pistol.

Q. Is that all?

A. That is all; that is all that hangs over me at all.

Q. Is that all?

A. There is no charge but that against me down there.

Q. That is all, is it.

A. That is, most positively; yes, sir.

Q. You paid a lawyer $30.00 to get out of a pistol charge?

A. He had a mortgage for that on it.

Q. It must have been something else?

A. That other was private affairs.

158 Q. Private affairs?

A. Yes, sir; it was, for a fact.

Q. What other?

A. That 20 dollars I got from him.

Q. Borrowed?

A. I got it from him.

Q. Did you borrow it?

A. I owed it to him.

Q. What for?

A. Private affairs.

Q. What matter?

Mr. HODGES (of counsel for defendant). I submit that he does not have to answer those question unless he wants to.

The DISTRICT ATTORNEY. Are you ashamed to tell what it was for?

A. I got some of the money to get clothes to wear; that is what I got part of the money for. I was short of clothes, and got some clothes.

Q. When you started back to Arkansas you were short of money?

A. Well, I had fifteen dollars and some few cents.

Q. Of that $20.00 you got from the lawyer? I thought you got that to get clothes with? Four dollars would hardly get you much clothing. That won't do.

A. It got me a pair of pants.

Q. You started out short when you started back?

A. I had a little over $15.00.

Q. What became of your horse?

A. It is where it was; the lawyer has got it, I suppose.

Q. What is the lawyer's name?

A. I have got it wrote down some place on a peice of paper; maybe I can find it.

Q. Can you tell me?

A. I don't just remember, exactly.

Q. You swear to me you do not know his name?

A. I would know it if I heard it or seen it.

Q. Do you know it without hearing it or seeing it?

A. I do not remember just now what it was.

159 Q. You admit riding up into the Indian country with these men. They had a dog along?

A. Yes, sir.
Q. What became of the dog?
A. It got lost from me.
Q. You had a dog when you were at that negro woman's house?
A. Yes, sir.
Q. You killed the dog?
A. No, sir; I had him at McAlester, too, but he got lost from me.
Q. Shepherd dog?
A. Yes, sir; I suppose he was.
Q. You stopped at this negro woman's house, didn't you?
A. No, sir; I never was in the house.
Q, You were there?
A. I was across the road when I fed the team.
Q. You gave her these things?
A. I gave them to the little boy.
Q. What for?
A. Because I didn't need them.
Q. You got liberal?
A. I got them out of the wagon to lighten the load as much as possible.
Q. You had no load much? You had a few blankets?
A. Three four bushels of corn.
Q. You hid these bodies, threw them over there. Did you know that there were people living or staying within two or three hundred yards of where you were?
A. The closest house was to where Will went to get water, and he said it was 4 or 500 yards.
Q. You were right there where one man's house was in 4 or 500 yards of you, and another man was camped in 250 yards of you. I suppose during the time of the conflict when it was going on there was holloing and screaming going on so the people around there could hear it?
A. I holloed out to Will twice, and said, "What have you done?"
*Q. What did*
160 Q. What did Will turn on you for?
A. That is something I do not know his motive, unless he wanted to kill me.
Q. What had you done to Will to induce him to strike you?
A. I had done nothing; just the same as Ed.
Q. Ed. struck him with the cane, you said. You did not strike him?
A. No, sir; I run to take him away from Ed.
Q. Why would he try to kill you?
A. I don't know his motive; I don't know that he had any at all; just under the excitement.
Q. Who was the strongest, you or he?
A. I believe he was some the strongest, as far as licks were concerned; I could get the better of him in any tussle.
Q. Do you say that cut was made in his neck with an axe?
A. Yes, sir.
Q. Can you tell me how that cut was made in that way?
A. I can explain it like I did before.
Q. That is all the explanation you have got?
A. That is all there is to it.

Q. Did you see a man named Brown that went part of the way with you, a tramp, just before you got to Mr. Baerd's?

A. I seen a man; I don't know his name; he caught up with us.

Q. When the axe cut Will here that cut him, and he fell, did he?

A. Yes, sir; he fell.

Q. Then you picked up the axe and slashed it into his head?

A. No, sir; he turned loose the axe and I retained my hold on it, and as he came at me with the chunk of wood I hit him and knocked him down.

Q. You hit him twice more with the axe?

A. Yes, sir.

Q. He had three cuts up here; how do you account for that?

161 A. I suppose the three licks done it.

Q. Then you struck him with the pole of the axe here?

A. I could not say whether it was the pole of the axe.

Q. How many wounds did you have to show for the conflict?

A. I had nothing but a bloody nose and mouth mashed; that is all I had.

Q. Did anybody ever see you with a bloody nose?

A. No, sir; not that I know of.

Q. Did anybody ever see you with a scratch on your skin?

A. Not that I know of, because I don't know there was anybody there.

Q. When you got to McAlester it had not got well, had it?

A. There was no scratch that I know of.

Q. You didn't have a scratch on your person; you left there with two men dead, one of them with his skull split open, and the other one with his skull split open in three different places, and his throat cut, didn't you; with every cent of money in his pocket, burned the pocketbook in the fire you admit belonged to them, and all the money they had on earth in your possession, and went down to McAlester to sell the team; that is what you admit?

A. I tried to sell the team.

Q. You admit you changed your name?

A. Yes, sir.

Q. You admit you hid the axe in the hollow tree?

A. Yes, sir.

Q. You admit you tried to sell the property of the men who were killed?

A. Yes, sir; I knew if he was alive, and anything like that occurred, Ed. would say, "John take it, and do the best you can."

Q. Did you return it to his father?

A. I was aiming to replace the money and send it home.

162 Q. Were you going to tell?

A. No, I was not going to tell.

Q. Why wouldn't you tell?

A. Because I didn't want it known; I was afraid of the courts.

Q. Why didn't you tell the father of the man he was killed by William?

A. I was afraid my story would not be believed, as I said awhile ago.

Q. You are not afraid about not being believed now; you tell it now?

A. That is left to the jurymen.

Q. You tell it now?
A. Yes, sir.
Q. You refused to tell your name, even to this Mr. Bolding?
A. I never seen this man until he came down to recognize me.
Q. You didn't see him at the jail?
A. I seen him when he came with Mr. Vandevre.
Q. When you were in jail, didn't you see him?
A. Yes, sir.
Q. Why did you say you didn't know him?
A. I said I knew him when I spoke to him when he came with Mr.——
Q. When he came the first time?
A. I don't know nothing about but the one time.
Q. You do not know nothing about that, of course. He knew you and told you who you were. You knew him well, didn't you?
A. Yes, sir.
Q. Then you knew him when he was there? Do you remember meeting a man named Brown, in the jail, that your father sent down to see you while you were in jail? You never told your real name until he came, did you?
A. I didn't say anything about it then.
Q. How long afterwards was it you owned up you were Pointer?
A. I have never called my name only in this court-house. I have never denied it. It is a name I am not ashamed of.
163 Q. You have been ashamed of it?
A. No, sir; it wasn't on that account; I wasn't ashamed of it. That was not the reason that I changed it.
Q. You certainly changed your name?
A. Yes, sir.
Q. These bodies were pretty heavy?
A. Yes, sir; I could not carry them.
Q. Did you drag them?
A. I carried them the best I could.
Q. What did you say you did not carry them for?
A. I did not carry them clear of the ground; I carried their head and shoulders off the ground.
Q. How could you carry these men and not get blood on you?
A. I didn't get it.
Q. What made these spots of blood all the way from the tree, now and then? Because you stopped to breathe, I suppose. What time did you leave that place?
A. Just about sun up; I could see the sun?
Q. You think Will was a little stronger than you?
A. Yes; I could get the best of him in a scuffle.
Q. After you had knocked him down with the axe, and you could get the best of him, why hit him again?
A. He started to get up, and I thought he would hit me with the club.
Q. You could get the best of him in a scuffle?
A. In a fair scuffle, but with an axe——
Q. The axe was in your hands when you struck him the second and third blow; it was in your hands when you struck him the fourth blow?

A. I did not strike him the fourth blow; I didn't strike but three.

Q. How did he get this one here?

A. I don't know; I suppose that is where Ed struck him with the cane; I don't know how it came there.

164 Q. You struck him three. Which one went through his skull? How is it, after you had the axe in your hand—had struck him so that the blade of the axe went crushing through his skull into his brain and knocked him down—why did it become necessary to throw it the second time?

A. I didn't strike him with the blade. He jumped up and started at me with the club the second time.

Q. You undertake to say that a man, knocked down as he was, with his skull crashed, would jump up and come at you with the club?

A. I don't suppose that his skull was crashed by that second lick.

Q. When did you strike him the third lick?

A. When he started to get up again.

Q. How near was he up the last time?

A. He was almost in a setting position.

Q. You struck him on the head with the axe, and you a man that is capable of getting away with him in a struggle; what in the name of common sense did you do it for?

A. I was really defending myself the best I could.

Q. He had had his throat cut, and you had struck him with an axe in the head and knocked him down twice, give to him the wounds that have been described here, and then while he was in a sitting posture you struck him down while he was setting down, in your self-defense?

A. He was getting up again, and he still had a club in his hands.

Q. You were capable of struggling with him; you had two wounds upon him. Did he strike you with the club?

A. He struck at me.

Q. Did he strike you?

A. No, sir.

Q. How did that hair and blood get on that piece of stick there?

A. I suppose that was done when I knocked him down.

165 Q. Which time?

A. I don't know; I have no idea.

Q. Was he standing up when you struck him the first two blows?

A. Yes, sir.

Q. Please tell me how it is that the man you were struggling with would permit you to strike him right square on the top of the head every time. It seems to me that he would have thrown up his hands, got it on the back of his neck, or hands, or some place. How did you manage to get all the blows on the top of the head, one right after the other, and all in the same direction? He just stood there and let you do it?

A. No; he surely didn't.

Q. How did you get them all in that way? You hit him on the top of the head each time. You must be pretty handy with the axe. Did you ever do much wood chopping?

A. Not much.

Q. You never handled an axe much?

A. Not much; sometimes.

Q. You struck him everytime right on top of the head?

A. I could not say whether it was right on top of his head; I hit him every time I struck him.

Q. You heard where these wounds were. You struck him three times; you admit that he was setting down one time?

A. He was starting to get up; almost as straight as he would be setting up.

Q. Who was running around that tree?

A. Both of us.

Q. What for?

A. I was getting out of his way.

Q. You succeeded. What did you do with the hats?

A. The hats were in the fire.

Q. What did you do with Ed's overcoat?

A. I don't know; it is in the wagon, I suppose.

Q. He had a black overcoat, did he not?

A. He had a striped one.

Q. It never was found; what did you do with it?

166 A. It was in the wagon, I guess.

Q. What did you do with the overcoat?

A. I don't know anything of it.

Q. Did you sell it?

A. No, sir.

Q. Did you give it away?

A. No, sir.

Q. You burned the hats?

A. Will's hat fell in the fire in the scuffle, and I burned Ed's; put it in there; covered up everything just as well as I could, under the excitement of the moment.

Q. Burned your poor friend's hat. Did it have blood on it; was it cut through?

A. No, sir.

Q. What did you burn it for, then, if it was not cut through and bloody?

A. A fellow will do lots of things under the excitement of the moment that he would not do when he was cool.

Q. You did not burn the overcoat?

A. No, sir; I don't know nothing of the overcoat.

Q. Why did you burn these hats if they didn't have gashes in them and were not bloody?

A. Ed's hat was laying on a bale of hay, and Will's had already burned, and I put Ed's in the fire.

Q. Both of their hats were burned, the pocket book was burned, and the crutch was burned; what else did you burn? How did this bracelet get out there?

A. I know nothing of it.

Q. They must have come from his pocket; the pocket book must have come from his pocket.

A. It did the night before, as I said.

Q. But this bracelet must have come out of the pocket, too.

A. I know nothing about that; he may have lost that.

Q. It is wonderful that he would lose it just at the spot where he was killed. Who did you take the belt from?

A. I didn't take it from anyone.

167 Q. Which one owned it?

A. William Bolding.

Q. You had his watch?

A. Yes, sir; he gave it to me for security for three dollars I had let him have.

Q. These men were killed, and you were in possession of all their property?

A. You see, that watch was give to me ——

Q. Is there anybody on earth knows that besides yourself?

A. I don't know that there is any witness to it.

Q. No one there but yourselves the night before?

A. No, sir.

Q. These witnesses say that you, when you went away, turned your horses in and out; what did you do that for?

A. I turned around and came into the road.

Q. What did you make all these turns for?

A. After I got across the branch the bald face horse got out of the road, and I pulled him back in.

Q. Where did you start to go when you started to go back towards your home in Texas?

I started to go where I did go—to McAlester.

Q. What were you going to do there?

A. Try to sell the team.

Q. What were you going to do then?

A. Going home.

Q. To Eureka Springs?

A. Yes, sir.

Q. Not say anything about it?

A. I was going there to see my father ——

Q. You were not going to say anything about it?

A. No, sir.

Q. Going around all through your life without telling how thes' men got killed?

A. I don't know how that might be.

Q. That was your intention at that time?

A. Yes, sir.

Q. To carry that secret forever?

A. I didn't think nothing about it.

168 Q. You did not intend to tell anything about it.?

A. I didn't at that time.

Q. Had you and Will ever had a quarrel before?

A. Not on the road; not on that trip.

Q. Had you ever had one?

A. We just had a little dispute one day going out there.

Q. Nothing to engender any hard feeling on his part towards you, or from you towards him?

A. No, sir.

Q. What was he killing you for?

A. He didn't kill me.
Q. He was trying to, and come pretty near killing you.
A. It looked like he was trying to.
Q. What was he trying to kill you for?
A. I don't know nothing about it; I don't know what he had in his mind.
Q. He was doing it mighty hard; doing it so hard that he cut his own throat with the axe. He cut his own throat, did he not?
A. Not as I know of.
Q. This is your knife that we have got here, is it not?
A. Yes, sir; one of them.
Q. You had that at that time?
A. Yes, sir; I did.
Q. Why didn't you take out your knife and go at him?
A. I did not have time to do anything only just merely to get out of the way and get the tree between him and I.
Q. Did that place in the throat bled much?
A. I don't know whether it bled much or not; I didn't look at that; I didn't want to look.
Q. You didn't want to stop to look at that? Did the blood spurt out of it?
A. I didn't look.
Q. Did you drag him by the heels or the head?
169 A. I caught him under the shoulders and tried to carry him.
Q. With his throat cut and his head smashed, how is it you didn't get any blood?
A. I wasn't under him; I suppose that is the reason.
Q. Did you drag him by the hair of the head?
A. No, sir; I caught him under the arm.
Q. You had an overcoat on, didn't you?
A. No, sir.
Q. The overcoat got bloody and you burned it?
A. No, sir; I don't know nothing of the overcoat; I suppose it was found in the wagon.
Q. Did the other boy have any overcoat?
A. There was two overcoats along.
Q. Neither of them were found; what became of them?
A. They were in the wagon, as well as I remember.
Q. The gray overcoat belonged to who?
A. I don't know whether it was Ed's or Will's.
Q. There was two; one a gray and the 'ther black?
A. Yes, sir.
Q. The gray you put back in the wagon, and the black one you didn't?
A. I think they were both in the wagon.
Q. Then what became of it?
A. I don't know; I am positive they were in the wagon, because I know nothing of them.
Q. This woman said you were inquiring where you could find a Winchester; is that true?
A. No; I didn't inquire of her.
Q. Did you inquire of her little boy?

A. He had one of these little postils and he said: "Do you want to buy a gun?" and I said: "No; what is it? A Winchester?" And I just spoke that way, light, and he said: "No." I said: "If it was a Winchester I would buy it."

Q. Didn't you go to town after a Winchester?

170 A. I started to town; I didn't go after a Winchester. I said: "I will go back and get me a Winchester," that way, and started off.

Q. What were you asking for the wagon and team in McAlester?

A. $150.00.

Q. Did you not finally make a contract with an Italian for it for $100.00?

A. No; he said he would give me that for it.

Q. Didn't you make a contract of sale?

A. No, sir.

Q. What was his name?

A. I don't know.

Q. You were in that wagon that Sunday when Mr. Flippo came in, wasn't you?

A. I was in there.

Q. What were you doing?

A. Talking in there.

Q. What were you talking about?

A. Just one thing and then another.

Q. Why didn't you go somewhere else; what did you want to get in the wagon for; why not go to a fire and talk to him?

A. It wasn't a cold day.

Q. It was in the winter time. What time in the morning did this killing occur?

A. Just daylight.

Q. One of them was making bread and the other's shoes was not tied?

A. I was making bread myself.

Q. The shoes of one of them was untied?

A. I don't know about that.

Q. You threw the pan away?

A. Yes, sir.

Q. You threw that 'way and left the small pan on the fire with the rock in it?

A. I didn't remove it after I put it there to warm the rock to put at Ed's feet.

Q. That pan could not have been on there while you were burning the cruc*i*h, and hats, and everything, could it?

A. Yes, sir; it was.

171 Q. Why didn't you take the axe, wash it, and take it along with you?

A. I was excited; I didn't know what to do. I wanted to get away as soon as possible.

Q. You seem to be an excitcable young man. Did you see Mr. Vandevere when he came to the jail?

A. Yes, sir.

Q. He is the father of Ed?

A. Yes, sir.
Q. I suppose you told him about it then?
A. No, sir; he gave me no chance to have any conversation with him.
Q. You thought it was a secret that was not best told?
A. Yes, sir; I wasn't aiming to tell it to everybody. I concluded the best thing was to keep quiet about it. I didn't aim to say anything after I was arrested until the trial came off.
Q. Why?
A. Because, I have seen fellows talking down there in jail, and they would say that everything they had ever said was brought out, and they would get it wrong, and all that.
Q. When did you commence to have that kind of talk with the prisoners?
A. I never had any private talk with any of the prisoners.
Q. You say that they had that talk with you?
A. No, sir; they told it publicly when they came back. I heard Johnny Thornton talking when he came back.
Q. When did you come to the conclusion you would not tell it?
A. The very day I got in the wagon and started off.
Q. There was a burn on one of them, one of their hands, was there not?
A. I don't know.
Q. Did one of them fall in the fire?
A. He fell right to the edge of the fire, Will did.
Q. Will Bolding fell in the edge of the fire?
A. Yes, sir.
172 Q. Where did the other man fall?
A. He fell with his head toward the bank from the tree.
Q. How far from the tree?
A. He was standing in a foot or two of the tree; about 2 feet.
Q. What tree was it you and Will were scuffling around?
A. The same tree.
Q. How did he get back to the fire when he fell in the fire?
A. Me and him scuffled back to the fire from the tree.
Q. He is the one you dragged from the fire, is he?
A. Yes, sir.
Q. He is the one that fell with his hand in the fire, if either on them fell that way?
A. I don't know that he fell with his hand in the fire. When the horses jumped and turned him around part of him brushed the fire; I noticed the ashes stir up when the horse jerked him off of his feet.
Q. These pants that you had on were pants that belonged to one of the dead men?
A. No, sir; they belonged to me.
Q. They didn't when you left Texas?
A. No, sir.
Q. Then you had a valise with *with* their clothing in it?
A. Yes, sir; it was my valise.
Q. What were you going to do with that?
A. I don't know what I was going to do with it; it was in the wagon.
Q. Didn't you have a pair of pants of your own?

A. Yes, sir.

Q. What became of them?

A. I threw them away when I got these.

Q. I will ask you if you did not burn those pants there at the fire, if they did not have blood on them, and you put the other man's pants on?

173 A. The morning that we come into the Choctaw Nation, Indian Territory, I got these pants from Will and threw mine away.

Q. He started away from home with these pants, did he not?

A. I suppose he did; he had them with him.

Q. He had them on, did he not?

A. No, sir; he didn't have them on when I caught up with him. He had on a pair of striped pants, and wore them on from there as far as I was with him.

Q. Was it the same axe that killed both of them and made all these wounds?

A. Yes, sir.

Q. Will killed Ed, cut his own throat, and you chopped his head here?

A. No, sir.

Q. Yes, sir?

A. No, sir.

Q. He cut his own throat, did he not?

A. No, sir.

Q. Who did?

A. I didn't do it or Will either; it was an accident, when I went to shove him back to get him loose from the axe.

Q. That axe is in the same condition it was, is it not?

A. I don't know whether it is or not.

Q. It was as sharp as it is now, and it dropped down this way and cut his throat?

A. No, sir; he had hold of the head of the axe; he throwed it up that way to wrench it out of my hands, and just as I put my foot behind his foot I shoved the axe to shove him back over my foot to get him loose.

Q. The axe is no sharper now than it was then, is it?

A. I don't know; I can't tell you.

Q. It is in the same condition. It is the same axe?

A. Yes, sir; it is the same axe.

Q. You know the axe?

A. Yes, sir; I do.

174 Q. I believe you said you struck Will, and after you struck him the first blow, did you push him down when his throat was cut?

A. As I explained while ago just how it was; he went to wrench the axe out of my hand—

Q. Did you shove him down?

A. I put my foot behind him and shoved; just as he went to wrench it I shoved, and he turned loose of the axe and fell and cut himself.

Q. And you took up the axe and he got up——

A. As I said before——

Q. You got the axe and he got up with a club?

A. He got up with a club, yes, sir; and I stepped back.
Q. How big a club was it?
A. It was as large as a man's arm.
Q. How long?
A. I don't know; about a foot and a half, I suppose.
Q. A good deal easier to handle than the ace?
A. I don't know.
Q. Did you handle the axe with both hands or one?
A. Both.
Q. And then before he could strike you you hit him on the head and knocked him down?
A. He struck at me; he didn't strike me.
Q. You put the axe into his head and then he got up again.
A. And run at me the second time.
Q. You knocked him down then, again, when he was in a setting posture, after he got these two fearful cuts in the head, you whacked it to him again?
A. He was about that [indicating] straight, I said.
Q. You said he was in a sitting position.
A. He had got up that far [indicating].
Q. Did you kill him that time?
A. I don't know; I suppose that he was killed.
Q. He seemed to be pretty dead when these people found him?
175 A. I wasn't there then; I suppose he was dead; I took him for dead.
Q. Did you feel his pulse to see if he was dead or not?
A. No, sir; I am no doctor.
Q. Did you speak to him?
A. No, sir.
Q. Didn't speak to either one of them?
A. No, sir; I didn't think it was any use.
Q. Why?
A. Because they were dead, I supposed; I took them to be dead.
Q. You put on that new suit of clothing you have on now this morning?
A. No, sir.
Q. When did you get them?
A. About a week ago.
Q. You have not been wearing them until yesterday evening?
A. Yes, sir.
Q. When did you first put them on?
A. Sunday week.
Q. The jailer said he took the pants off of you a few days ago.
A. I took the pants and brought them up here myself yesterday. I wrapped them up and brought them here myself until I got out.
Defense closes.
Here court adjourned until Friday morning, 8:30 o'clock, March 25th, 1892.

176 Thereupon the Government offered in rebuttal the following witnesses, viz: P. B. Bolding, O. B. Fetter, Peter Adamson, Wm. R. Vandeveer, and James H. Neal, who testified as follows:

177 FRIDAY MORNING, *March 25th*, 1892—9:00 *o'clock.*

*Testimony offered by the Government in rebuttal.*

Mr. P. B. BOLDING, having been recalled by the Government in rebuttal, was examined by the district attorney and testified as follows, to wit:

Question. Did you examine the cut upon the neck of your boy?

A. I doidn't examine down into it—the depth of it; I saw it, had my hand on the cut; I didn't probe into it.

Q. Describe it as near as you can.

A. It was a smooth——

Mr. HODGES (of counsel for defendant). I believe this is a reopening of the case. I make that point.

The DISTRICT ATTORNEY. The wounds, of course, were described by some of the witnesses; they were not described by this witness. The defendant goes upon the stands and offers testimony that the wound was made by a certain instrument—an axe; I propose now to show from the nature of the wound, by those who saw it, that the wound was of such a nature——

The COURT. I think it is competent.

Mr. HODGES (of counsel for defendant). We except on the ground that the testimony has been before the jury before and the wound described accurately.

The DISTRICT ATTORNEY. Go ahead.

Answer. The wound was just smooth cut, about two inches long; it looked to be almost as deep as the cut was long in the neck. I
178 had my hands on the cut that way, but did not put it clear down in; it was gaping open just this way [indicating], just cut right across the soft part of the neck, but on the right side, just back of the windpipe.

Q. Please state if it was a smooth cut or jagged wound.

A. Smooth cut; looked like it had been cut with a very sharp instrument; no jags about it.

Cross-examination:

Mr. HODGES. How long had your son been dead when you saw him?

A. I don't know; I saw him on the 7th day of January.

The DISTRICT ATTORNEY. He was killed on the morning of the 26th of December, or the night of the 25th.

Mr. HODGES (of counsel for defendant). I will ask you if it is not a fact that it was but a casual notice of that cut that you got?

A. I took my fingers and put them on the cut and examined it.

Q. Why is it you are so indefinite about it? You don't know anything about whether it cut his throat or not.

A. I noticed the cut was nearly two inches long, and it looked nearly as deep as it was long.

Q. You say it was a gaping, open wound?

A. Yes, sir.

Q. Don't you know if that wound had gone to the jugular vein and windpipe you would have been bound to see it?

A. I don't know whether it cut the windpipe or not.

Q. Don't you know it didn't? And don't you know it didn't cut his throat?

A. I know it did cut his throat, but I do not think it cut his windpipe.

Q. You know it cut his throat?

A. The throat part.

179 Q. Tell us where that was with reference to the collar bone?

A. It was behind the collar bone, right on the soft part of the neck, just back of the windpipe.

Q. The windpipe wasn't touched, and his throat was cut? You can stand aside.

180 Mr. O. B. FETTER, having been recalled by the Government for rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. You are the gentleman who testified yesterday that Bolding bought hay from you?

A. Yes, sir.

Q. I will ask you if you examined the wound upon the neck of Mr. Bolding?

A. Yes, sir.

Mr. HODGES (of counsel for defendant). We interpose the same objection.

The COURT. Yes, sir.

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. What sort of an examination did you make?

A. I washed him, and I washed him, and I put my finger down into the hole.

Q. How deep?

A. Something about 3 inches.

Q. Deeper than it was long?

A. Yes, sir.

Q. You put your finger into it?

A. Yes, sir.

Q. Where was it?

A. Right there on the neck?

Q. Please state if the windpipe was cut, or whether it went behind or in front, or how about that.

A. I could not say; it seemed to go to the side of it that way [indicating]; right by the collar bone.

Q. You say you put your finger into it about three inches?

A. Yes, sir.

Q. How long was it?

A. Something about that long long [indicating on finger about 2 inches].

Q. You put it nearly an inch shorter than it was deep?

181 A. Yes, sir.

Q. Please state if it was a jagged wound or a clean-cut wound.

A. Clean cut, seemingly—very clean cut.

Q. Did you notice whether the hand of either one of them was burned?
A. Yes, sir; the hand of this young man was burned in little spots, where he had struck the fire; had turned his hand upside down on the fire, seemed like.

Cross-examination by Mr. J. C. HODGES:

Question. That seemed to be very smooth cut?
A. Yes, sir.
Q. You have be'n talking with the district attorney about it since you were on the stand, have you not?
A. Only what I was asked.
Q. Of course you have been asked. It didn't occur to you to say anything about how smooth it was cut when you were on the stand yesterday. Did you describe that wound to me yesterday as being an inch and a half long, and a gapped, open wound?
A. No, sir; I did not.
Q. Did you examine into the wounds upon the head carefully?
A. As near so as I could.
Q. What sort of wounds were they?
A. The skull was broken open; piece of it seemingly was torn wrong side out.
Q. How many licks on the head?
A. I think there were four altogether. The one that seemed to be turned wrong side out seemed to be from here down to his nose.
Q. Was it made with the back of the axe?
A. I suppose it would be the back of the axe; that is the way I understood it.
Q. I want to see whether that was cut there or broken and mashed in?
A. I think it was mashed in.
182 Q. You could see that one as good as you could the other?
A. Yes, sir.
Q. Why don't you tell us whether it was a bruise or a cut?
A. I say it was mashed in.
Q. Was Mr. Baerd there when it was examined?
A. They were standing around when I washed it.
Q. You and he are testifying to the same man—Mr. Bolding?
A. Yes, sir.
Q. You testify that it was mashed in with the back of the axe?
A. Yes, sir; I think so; I just used my judgment.

183 Mr. PETER ADAMSON, having been duly sworn by the Government in rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. You live at Wilburton, do you not?
Answer. Yes, sir.
Q. You are a minister of the gospel up there?
A. Yes, sir.
Q. Did you see the dead bodies of Mr. Vandevere and Mr. Bolding?
A. Yes, sir; I saw them after dinner on the 26th.
Q. Where did you see them?
A. In the bed of the creek out there where they were found.

Q. Were you present when they were washed?
A. Yes, sir.
Q. Did you know Mr. O. B. Fetter?
A. Yes, sir.
Q. Please state if you saw him make any examination of the wound of Mr. Bolding, the one that had the cut in his neck.
A. Yes, sir; I saw him make an examination of the cuts on the head and also on the neck.
Q. Describe that cut on the neck.
A. It seemed to be about right in here [indicating], seemed to be about 2 inches across there. I could see in an inch. I saw him put his finger in it, and when he put his finger in it, I kind of turned my head, felt somewhat bad.
Q. Without putting the finger in, you could see about an inch?
A. Yes, sir.
Q. How much deeper you do not know?
A. No, sir.
Q. Please state whether it was a clean-cut or a jagged wound?
A. It was a clean-cut wound, according to my best judgment.

184 Cross-examination by Mr. J. C. HODGES:

Q. Did you see anybody examine the wounds of the head?
A. We all looked at them.
Q. It seems you made a very minute examination of the one on the neck, and didn't notice the others so much. Why is that?
A. The reason I noticed that was because we had not noticed it until we came to wash it; the way it had been laying in the bed of the creek, we didn't notice it, but when we took it out and got the coat back, we saw it then.
Q. It was down about the collar bone here?
A. It was down about here.
Q. That is not very far from the collar bone. Your finger is right on your collar bone, is it not?
A. No; my collar bone is further down here.
Q. Were these wounds on the head cuts or bruises?
A. The young man Bolding was cut, I am satisfied, with the edge of the axe; seemed to be an axe.
Q. Mr. Fetter and you saw it at the same time, didn't you?
A. Yes, sir.

185 O. B. FETTER, having been recalled upon behalf of the Government in rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. Please state when you found Mr. Bolding in the creek the condition of his clothing, the coat.

Mr. HODGES (of counsel for defendant). Does your honor propose to have the case reopened entirely?

The COURT. We are very liberal in these things. If you have any evidence to rebut it it is very proper for you to do so.

(Defendant excepts.)

The DISTRICT ATTORNEY. I desire to state to the court that this evidence is strictly in rebuttal.

Mr. HODGES (of counsel for the defendant). There is nothing before the court now.

The COURT. No.

The DISTRICT ATTORNEY. I desire to state my position so it may go down upon the record.

The COURT. State your position.

The DISTRICT ATTORNEY. The defendant was upon the stand and swore that when these men were killed he took them up by the head part and shoulders, and carried them as best he could in that way to the place where he throwed them over. I want to disprove that now by showing that Bolding's clothing were all rolled up under him, as though he had been dragged by the legs.

The COURT. That would make it clearly in rebuttal, clearly so.

The DISTRICT ATTORNEY. State how that was.

186 When I gathered him up he seemed to be with his clothes in a wad; his clothes were all rolled up under him right there [indicating.]

187 Mr. WILLIAM R. VANDEVERE, having been recalled by the Government in rebuttal, was examined by the district attorney as follows, to wit:

Question. Please state if there were any overcoats taken away by your son.

A. There were two.

Q. What kind were they?

A. One was a kind of a light overcoat, light colored, and the other was a black overcoat.

Q. Whose was the light one?

A. It belonged to my son. My brother gave it to him, and he gave it to Will Bolding to wear back to Eureka Springs; and he had another one, a black one.

Cross-examination by Mr. J. C. HODGES:

Q. Do you know anything about what went with these coats?

A. The light one was in the wagon; the other one, I never saw it.

Redirect examination:

The DISTRICT ATTORNEY. Q. You found one?

A. Yes, sir; I found the light one.

Q. The other wasn't there?

A. No, sir.

Q. Please state if a dog went with your son.

A. Yes, sir; a shepherd dog.

Q. Please state if you ever got the dog.

A. No, sir; I could not find him; we heard of him being at McAlester, and that is all we could hear.

188 Mr. JAMES NEAL, having been duly recalled by the Government in rebuttal, was examined by the district attorney, and testified as follows, to wit:

Question. When you got this wagon, please state if you found any overcoats, and, if so, how many?

A. We found one overcoat in the wagon.
Q. What kind?
A. It was a kind of light overcoat; pretty well worn; what might be called Scottish goods.
Q. Did you run across any black overcoat?
A. No, sir; we did not.
Testimony closed.

189 This was all the testimony offered on either side in the case.

Whereupon the defendant again moved the court to require the dist. attorney to elect upon which count of the indictment he would further prosecute defendant. The court overruled this motion, to all of which rulings of the court defendant then and there excepted.

Sixth. After argument by counsel the court charged the jury as follows:

190 February term, 1892.

In the circuit court of the United States within and for the western district of Arkansas.

UNITED STATES
*vs.*
JOHN POINTER. } Murder.

JUDGE'S CHARGE.

Delivered March 26th, 1892, 8:35 a. m.

PARKER, *J.*

GENTLEMEN: The defendant, John Pointer, in this case stands before you charged with having committed two murders. There are four counts in this indictment. The first two counts have reference to the killing of Samuel E. Vandever, and they only differ in regard to the manner of the killing. The first count charges that the defendant wilfully and with malice aforethought took the life of Samuel E. Vandever with an axe by striking, cutting, penetrating, and wounding him, the said Samuel E. Vandever, in and upon the right side of the head; and it alleges further that this wound was mortal, and from it resulted the death of Samuel E. Vandever. The second count makes the same charge, except it charges that the weapon or instrument used was of a different character from that set out in the first count of the indictment. The next implication arising from the charge in the first count is that the axe was used in the way that men use it when they cut with it, with the sharp edge of it. In the

191 second count it is charged that the axe was used so as to strike, beat, and bruise Samuel E. Vandever upon the right side of the head, and by that means to give to him a mortal wound, or wounds, of which he died. The third count in the indictment charges the killing by the defendant, John Pointer, of William D. Bolding, and that it was done wilfully and with malice aforethought with an axe by striking, cutting, penetrating, and wounding him, the said William D. Bolding, in and upon the right side of the head, giving to him thereby, and by that means a mortal wound, or wounds, of which he died, and that he did die from the

effects of that wound. The fourth count makes the same charge; that is, the charge of killing by the defendant, John Pointer, of William D. Bolding, wilfully and with malice aforethough' with an axe, and charges that it was used so as to strike, beat, or bruise the deceased William D. Bolding, and thereby to produce a mortal wound upon the right side of the head of him, the said William D. Bolding, of which wound he died.

Now, we are to ascertain what is necessary to be found in order to establish these charges. The Government says they are true. The defendant says they are not true. The truth or falsity of these charges, therefore, is the issue before us. The first thing that we must ascertain upon entering into every trial, the first questions that confronts the jury is the question of the jurisdiction of the court to try the case. If it be true that the court has no jurisdiction because it has no right to take up the subject-matter, or because it has no jurisdiction over the place where the offense is alleged to have been committed, or over the person, that is the end of it. That, therefore, is a necessary element to be found by a jury
192 in passing upon a case. To find jurisdiction it is necessary to find that Samuel E. Vandever and William D. Bolding were white men and not Indians. The general status of a white man in this country is that of jurisdictional citizenship, and whenever the Government proves the party is a white man that establishes a prima facie case of jurisdiction such as is alleged in the indictment, a case of jurisdiction that is good until it is overthrown by establishing an exception, such as the fact that a man has been de-nationalized, or that he has become a part of one of the Indian nations under their laws by marriage or otherwise, but until that is shown the presumption is sufficiently strong to authorize you to believe that he is a citizen of the United States when it is shown that he is a white man, and that, therefore, the case is within the jurisdiction of this court. In addition, it must be shown that the act of killing was committed within the jurisdiction of this court—that is, within the geographical jurisdiction, within the country over which this court has jurisdiction; or, in other words, done in the western district of Arkansas. If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of this court. If you believe that the bodies were found at a point twelve miles east of Hartshorne, and three miles west of Wilburton, and 27 miles east of South McAlester, and from one-half to one-fourth of a mile south of the Choctaw railroad track, such a place would be in the territorial jurisdiction of this court. That, then, is the first proposition to be found. If you have found that from the evidence in this case, you pass on to the next requisite to be established by the proof, and that is that
193 Samuel E. Vendever and William D. Bolding are dead. You go to the evidence to ascertain that. It is to be proven to the same degree of certainty as any other requisite of this charge—that is, beyond a reasonable doubt—with no greater certainty, nor can it be established with any less degree of certainty.

As I enumerate these requisites that are to be established you will permit your minds to revert to the testimony, to the proof in the case, and if you find that it establishes each one of them as you go along you can put them aside as proven.

The third proposition is that they died by violence of the nature described in some one count of the indictment. You will observe that I am using both of the names of the deceased in connection to avoid repetition. The definition of this crime as charged here is the same when applied to either case, and it is therefore unnecessary for me to repeat it. Upon the subject of the means used let us for a moment go to the charge as contained in the first count. We find that it is charged that John Pointer, the defendant in this case, wilfully and with his malice aforethought, killed Samuel E. Vandever by striking, cutting, penetrating, and wounding him with an axe upon the right side of the head and by giving to him upon the right side of the head one mortal wound of the depth of four inches and the length of half an inch, and of this mortal wound, it is further alleged, he died. This allegation as to the means used, or the weapon used, and the manner of its use, means, in the law, that the wound was inflicted with the bit or edge of the axe or some other cutting instrument.

You will observe that under the law weapons are recognized as being
194 of a kindred character if they produce results in the same way. For instance, in this case it is alleged that the wound was inflicted with the edge of an axe. If the proof shows that it was done with any other sharp or cutting instrument it would be responsive to the allegation—any other instrument that would make a cut or incised wound of that character would satisfy the allegation that it was done with the bit of the axe, which is the allegation as contained in the first count of the indictment and in the third count, the two counts having reference to the killing of the two persons. It means furthar that the wound which caused death was upon some part of the head or neck, and that it was an incised wound, or wound cut in the head or neck. It is not necessary that it should be on the right side of the head. If on any part of it or on the neck it is sufficient. It is not necessary that the proof should show the wound to be of the length and breadth alleged in the indictment. Then it means, and it must appear, that the wound was a mortal wound which caused the death; in other words, the death must be traced to the means used.

The second charge as relating to the killing of Samuel E. Vandever is contained in the second count of the indictment, and it is that the defendant, John Pointer, wilfully and with malice aforethought, took the life of Samuel E. Vandever by striking, beating, and bruising him on the right side of the head with an axe. With regard to the means used to produce this character of wound it is alleged to be a contused wound, or a wound produced by beating or bruising with some blunt instrument or weapon, and the same rule prevails as in the other case. You
allege that the man was killed with an axe by using the pole of it,
195 or one side of it, or using it in any way by which a contused or bruised wound might be produced, and you may prove that it was done with a club or any other weapon that would produce a wound of like character, and it would be responsive to that allegation.

The wound is alleged to have been produced with an axe. To satisfy this allegation the proof must show it was done with the blunt part of the axe, such as the pole, or one side of it, or with some other instrument or weapon of like character; and that the wound was a mortal wound, and

that the party who is alleged to have been killed died of it. These relate to the charge of killing of Vandever. They have reference to but the one offense.

The second offense, as charged in the third count of the indictment, is that John Pointer did, on the 25th day of December, A. D. 1891, wilfully and with malice aforethought, take the life of William D. Bolding, by striking, cutting, and penetrating the right side of his head with an axe. That means that the wound was inflicted with the blade of an axe, or some sharp or cutting instrument, and, as in the first count, that it was on some part of the head or neck, and that it was of some length and some depth, and that it caused the death of William D. Bolding; that is, that you can trace the death to this wound.

The second charge, as contained in the fourth count of the indictment, is that the defendant, John Pointer, on the 25th of December, A. D. 1891, wilfully and with malice aforethought took the life of William D. Bolding by striking, beating, and bruising him with an axe on the right side of the head, by this means giving to him, the said William D. Bolding, a wound that was mortal, and which caused his death. As in the
196 second count, if the proof shows the use of some blunt instrument or weapon with which a bruised or contused wound was produced, the allegation as to the means used would be satisfied, and if it shows that the wound was a mort alone, one causing his death, that would be responsive to that allegation.

When you have passed upon these two cases involved in these two charges, and find that the wounds were produced upon the persons of each one of them by either one of the ways set out in the respective counts of this indictment, or by kindred means, or by the use of a kindred weapon, and that they died because of these wounds, you have established the fact that they are dead, and that they died of violence of the character described in the indictment.

The fourth proposition that is necessary to be regarded by you is that this violence which caused the death of Samuel E. Vandever and William D. Bolding was inflicted by the defendant. The Government alleges that is true. The defendant asserts it is false. He admits, by his statement upon the witness stand, that he took the life of one of these persons who are alleged to have been killed, but that he did not do it criminally, and that therefore he is without crime, and that therefore you have no right to find a verdict of guilty of anything against him. The Government upon the other hand asserts that that is false, and it brings before you facts and circumstances for you to pass upon to show that it is false. Upon that issue all facts, if they be circumstances, or if they be positive facts, that are accusatory in their character, that go to show that the defendant committed these acts that resulted in the death of Vandever and Bolding, are
197 in direct opposition to the declarations made upon the stand by the defendant as a witness, and that is one of the issues in this case that you are to find, one of the parts of this problem that you are to solve by your verdict. As to the character of these kinds of evidence, and as to the weight of the respective facts and circumstances that are accusatory in their character, the court will refer to further on in the course of the charge.

The fifth proposition to be found is, that this violence was caused and death was inflicted willfully and with malice aforethought.

If the injury was inflicted wilfully and with malice aforethought the deaths that resulted from such injury would be caused wilfully and with malice aforethought. At this point it becomes necessary for us to ascertain what is meant by these expressions, willfully and with malice aforethought, because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime; there can be no crime of this kind without them. It is necessary, therefore, for us to understand correctly and to understand with precision and accuracy exactly what the law means by them, because they have a legal meaning; they have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case or the truth of the case that you, as intelligent, impartial, and dispassionate citizens, are able to arrive are a just and correct and honest conclusion. In finding their existence it is not necessary that the proof should show that a motive for the act done existed; there always is a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it can not be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offense
198 of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it can not be fathomed, and as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best—that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act; the law says, however, that wherever motive can be found, though it is not required to be found, it is the duty of the jury to find it, though when they do find it they are not to expect that it will ever be adequate; that it will be in proportion to the act done, because there is nothing on this earth that is in proportion to the crime of wilfully and deliberately taking human life; there is no motive adequate to it; there is nothing that cane be weighed upon the one side of the scale with the crime of deliberate and wicked murder upon the other side of it, and be pronounced by honest men as equal in weight to the crime committed. The law says that motive need not be proportionate to the heniousness of the crime.

"It is sometimes argued, is it likely that one man should kill another for so small an article? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle, that the homicide was the result of sudden passion rather than lucri causa, or for a mere prejudice or spite, is it likely that one man would assassinate another, and thus expose himself to the gallows? No doubt when a tender mother kills her child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity in the motivelessness of the act. But we have no right
199 to make such inference because the motive is disproportionate. We are all of us apt to act on very inadequate motives; and

the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passion, and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So also for the smallest plunder, murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car; Briggs was asleep; the watch was exposed, and Muller killed Briggs by a sudden attack, and succeeded in making his escape; he was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime with the murder. Until the confession, the justice of the conviction was largely criticized, on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder, as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational; the motive is never correlative to the crime, never accurately proportionate to it. Nor does this apply solely to the very poor; very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraints."

That is the way the law regards this matter of motive. Again, reading from the charge of Judge Landon, in the case of Billings, tried in the courts of New York:

"I speak first of motive. No man commits a crime without some motive leading him to do it. That motive may seems to be strong or weak. You are not to inquire whether the motive is one that ordinarily would lead to the commission of the crime charged. It is difficult for a mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission *to* any crime. You could not have a motive to take the life of a fellow-man except in the just defence of your own lives and rights, or in the just defence of the lives and rights of those who your duty it is to defend. But just defence is no crime. You may, however, properly inquire what motives do lead men to the commission of crime, and you will find where men's consciences and morals are depraved they are often led into the gravest of crimes by the smallest of motives; a small sum of money, a word spoken in anger, an insult, wrongs, real or imaginary, revenge, jealousy, hatred, envy, and malice, often lead to the commission of the crime of murder."

200 Therefore, in finding the existence of these elements that go to characterize a killing so as to make it murder, you may find their existence, though you do not find any motive. For illustration, you will understand that the law draws its deductions upon which are based its rules of rights and justice largely from the actions and conclusions and opinions of honest and upright and intelligent mankind; what they do under an existing set of circumstances the law recognizes as proper to be

done; what conclusions they may form from a given set of facts, the law deems a state of case upon which it may formulate a rule for the guidance of men when they come into courts of justice to administer the law, and when they have facts of equal proving power that convince intelligent and dispassionate citizens of the truth, they are regarded as being sufficient to authorize a jury made of such citizens to come to a conclusion of the truth of the proposition. Therefore, if you see A shoot at B, as intelligent men, and he kills B by such shooting, or you see him split open the head of B with a sharp instrument, and nothing else appears, no other fact or circumstance is presented to your mind but the mere fact of the act as done in that way, and the death of B is a consequence of it, I ask you what intelligent conclusion would you come to as a citizen, as to what character of offence that was? There are no other facts in it; nothing surrounding it but that. You, as reasonable men, conclude that A had murdered B, wouldn't you? Wouldn't that be your intelligent conclusion? Do you find any motive there? As an illustration I put a case where the motive is hidden; you don't know what it is; you do not care what
201 it is. In such a case it is not necessary for you to know it, because you find by your observation a wanton, wicked, and unprovoked act committed, which results in death, committed by deadly means, and whenever that state of case exists, whether the motive is presented or not, there are sufficient facts growing out of the manner of the killing to characterize that killing, that would authorize intelligent citizens as well as intelligent jurors to say that it was a case of murder. I give you this illustration to show you that actually and really intelligent men often come to these conclusions as to the character of the crime whether there is any motive or not. I repeat that whenever that motive is manifest, whether it be revenge, or desire for gain, or no matter what it may be, although you are unable to find that it is in proportion to the crime, you are to take the motive into consideration, not that motive alone will prove a crime by a particular party, but when coupled with other facts and circumstances it becomes an item of evidence; it goes to show not only the fact of the killing by that party, but above all it may go to characterize that killing, to show whether it was done in such a way as that it possessed the attributes of the crime of murder. Because, if a man kills another, for example, for money or property, he does it deliberately; he contemplates it; he premeditates it, and whenever it is done for that reason, whenever it is done because of a desire for gain, whenever it is desired to remove the obstacle between that gain and the one who wants to possess it in order that that one may obtain it, it then becomes powerful
evidence as a fact in the case to show the characteristics of the crime,
202 because when it is committed for that reason, there is no self-defence in it; there is no manslaughter in it; there is nothing in it but the crime of murder, committed for the sake of gain. Therefore I say where motive is proven, although it may not be adequate, you might set here until the end of time, and in the language of this law I have read you never would find in your judgment a motive that was in proportion to the commission of the crime of murder; no honest man could ever find it, because in his judgment it does not exist; he is incapable of weighing upon one side of the scale a human life that has been taken wilfully and wickedly, and on the other a few paltry dollars, or a little paltry property, or any other consideration.

We now come to the elements of this crime that go to characterize that act, to distinguish it from any other character of homocide; you will understand that under the laws of the United States there are but three conditions resulting from the taking of human life, two of which are criminal and one is innocent. One of them is named murder; it is not defined by the statute of the United States, but it was defined by the law in existence at the time of the enactment of the statute, in 1789, when the wheels of this Government were first put in motion. Another condition is manslaughter; which is defined by the statute. The law of self-defence is not defined by any express statute of the United States, but it is recognized as having an existence, but it is as it was defined to exist by the laws applicable to this country at the time of the declaration of its independence and the establishment of this Government. It is claimed upon the part of the defendant in this case that he killed only one man. He says the killing was justifiable, or, if not justifiable, that it is a crime of less grade than murder. I always make it a rule wherever there is any claim set up by a party charged with a crime that the act is an innocent act, or an act that is mitigated, to define the different grades of that crime, and I generally define them where there is no claim of that kind, because usually I have such confidence in the intelligence and integrity, and the honest purpose of the jury that I am charging, as to leave the solution of these matters to them—that is, for them to say, as it is their right and providence to say, without any desire or purpose on my part to trench upon that right and province of theirs to say, first whether a crime has been committed, and if so, what crime. Because the court may give these different conditions that arise from the taking of human life, it does not say to you that you are to apply one or the other; it leaves that to you. If there is no claim set up in the case that it is not a crime such as is charged, but that it is an innocent act, or an act that is mitigated, and therefore of less grade, yet in order that you can better understand the definition of murder the court gives the definition of these other conditions, and you apply the principle of logic that is recognized as correct, the principle of exclusion to the case, to enable you to say what the proposition is that you fasten your faith to. That is to say, if, after you have heard the definition of these other conditions, you are able to say, first, that it is not a case of self-defense, and you are able to say, second, that it is not a condition of manslaughter if a human life has been taken by the party charged, as a necessary consequence when you have excluded by the application of your reason to the truth of the case all the conditions but one, that condition must be the true one. It is a very correct way to arrive at a conclusion, if you can exclude, by the light of your reason that you apply to the facts every other condition but one in the case, that is the one you must find to be true. Therefore, it never can do the jury any injury to give to them the definition of all three of these conditions; by so doing they can the better and more clearly see and understand the definitions of the case and understand whether it is murder, as claimed by the Government, or some other state of case.

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Now, let us look to the law to see what are the definitions of these expressions that enter into this crime. The killing must be done wilfully, and it must be done with malice aforethought. Until we can find the

existence of these things as shadowed forth by circumstances, we can not find their existence at all, because they are in the mind, and until we find evidence of them in the shape of acts, they are unreal to us; they are unintelligible; they are indiscernable; we can not fathom them. We can know nothing about the actions of the human mind except as we see it manifested by human action; this is an intelligent way to get at the condition of the mind, because there is a known recognized connection between the normal mind, a mind in a healthy condition, and the action of a party. Every act is commanded by that autocratic ruler of the human body, called the human mind. It is a king, it is a despot; it rules absolutely the human body; it rules absolutely every movement of the human body; every movement that is an intelligent movement is made because it is commanded by the mind, and the connection between that mind and that body is so
205 intimate, is so actual, is so real, that when we find the body doing an act we may come to a conclusion as reasonable men that that act was conceived by the mind and commanded by the mind. You will observe, as I have reminded you, as I generally remind every jury, that this is one of those two conditions or elements of this case that can be found alone by circumstantial evidence, and it is a proposition that is as true as that the sun shines this morning, that there is never any crime tried in any court, and found to be true or false, that involves the element of intent, that that element must be established alone by circumstances. It is the only way it can be established; it is impossible to establish it in any other way, according to a strict and correct definition of the nature of circumstantial evidence. The condition of the kind is the proposition you are seeking to ascertain the existence of; that is the thing itself. Can you know it by sight? Can you know it by hearing? Can you know it by taste? Can you know it by smell? Can you know it by the application to it of any one of the five senses, by the application of any one of the means you have of possessing positive knowledge? You answer you can not. How are you to get at it? You get at it by presumption, by finding some other fact to be true that stands around it; it is a product of that kind as a consequence of its condition. To reason back from the fact that you find to be true to the one that you seek to ascertain the existence and truth of is a correct method. You may in this way find a condition of the mind that has an existence.
That is the thing that stands around the proposition. This method
206 is recognized by the law as a potent method of getting at the truth; it is recognized by the law as the correct method of ascertaining that thing. So, in this case, as in all others, to get at the condition of this defendant's mind, first you prove that he has done this thing, and done it in the manner and by the means as described in any one of the accounts of the indictment, then to find whether he wilfully and with malice aforethought did it. If you can find motive for it, and you can find it was done in consequence of that motive, and you find that that motive was a desire for gain, as shown by the evidence, with reference to the property of the deceased, when you find the killing was done because of a motive of that kind, as reasonable men, you must conclude that it was done wilfully and with malice aforethought, because all the elements that are regarded by the law as being sufficient to satisfy a rational jury that the elements of the crim' of murder exists in the case, would, under such circumstances, have an existence.

Now, I defined in another case here these elements that enter into the crime of murder, and the law was the same in that case as in this, and I can the better and in less time give to you the definition of this expression by reading to you what was said in the case of the United States vs. Boyd & Standley, a case of murder tried in this court.

"The word wilful, as used in connection with the charge of murder, such as that which is preferred in the indictment against this defendant, means an intentional killing, and not an accidental killing; it means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference in the law between an act which is accidental and that which is intentional. The law fastens intent to every act that is not an accident."

207 I refer to this condition called an accident that you may learn by contrast between that condition and all conditions outside of it where a human life has been taken, and that you may understand the better the meaning of the word intentional as used in the law, and you will observe that it is more comprehensive, that it is broader than it is when used in its ordinary significance. It means more when used in a case where human life has been taken than it ordinarily means. It means, in short, that in every case where a death has not been produced by accident, it has been produced by intent. In contemplation of law, that intent may be one of course that has no crime behind it, because it may exist in self-defence, but the act is intentional which produced death, and consequently the death is intentional.

You will observe that the word "intent," *or* may have a shadow of criminality attached to it, depending upon the other circumstances in the case—that is, it may be a case where murder exists. Then you will find an act growing out of a specific purpose or of a condition of general malevolence, a total recklessness of human life, a total disregard of the fact as to whether human life has an existence or not, or from a specific desire, such as a desire for gain or hatred or animosity or a purpose to satisfy a grudge, or to wipe out a spirit of ill-will or something of that kind, and when a condition of that kind exists, as shown by the testimony, the word wilfully has a darker and deeper and bloodier shade surrounding it than where a case of killing exists rightfully but intentionally done. Then I say that "The law fastens intent to every act that is not an accident. Every act that produces death which is outside of the definition of the word accident is intentional in the law, whether it grows out of a

208 specific design to take life, or whether it grows out of a gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken."

Now, I define to you the word accident, that you may contrast it with this other condition, known as a condition surrounded by intent:

"That which is an accident in the law is something that occurs after the exercise of the care that the law requires to be exercised to prevent its occurrence."

What a blessed condition of safety we would have in this goodly land if everybody understood that, for there would scarcely be any accidents as we falsely have them called upon our railroads, and in our factories and our mills, and in our coal mines, and in all these places over the country

where precious and honest and industrious human life is eliminated by the criminal carelessness of managers and agents. If the world but understood the full meaning of this word wilfully in the law, and this word intent, and insisted upon the application of the means that the law puts in its hands for its enforcement, human life would not be destroyed by the score and by the hundreds and by the thousands as it is now. And yet we find that the people are living indifferently, without even in many cases an intelligent inquiry being made as to the causes of these terrible results.

"That which is an accident in the law is something which occurs after the exercise of the care the law requires to be exercised to prevent its occurrence."

What is that care?

"When a man exercises the amount of legal care exacted by the law, and something occurs beyond that, that is not his wilful act; the law recognizes that he does not do it wilfully, but when he does an act which naturally or reasonably or probably, from its nature, and the way
209 it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional; and whenever the act is done, and it is an act that may naturally or probably produce a certain result, whenever the act is done intentionally, the result is intentional. For example, if a man presents a gun at another, and fires it at him, the fact of drawing the gun and presenting it shows that he wills what he does, shows that that act is a wilful act upon his part, and when that state of facts exists the act of presenting and firing the gun is recognized by common observation and common experience as a wilful act."

So in any other case, where a man uses a dangerous or deadly weapon in a way likely to produce dangerous or deadly results, if a deadly result is produced, the law says he intended that result. If the proof shows, for example, that he uses an ax, or any other sharp or blunt instrument in a deadly way, so that the lives of men are taken from the use of the axe in that way, the law says to you that as reasonable men you must infer that he intended the result, though it be death which followed such use of it. In other words:

"If that act produces death, because there is a known connection between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result. Now, intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it is done, and the character of the weapon used, bearing in mind that the law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge, within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or a pistol at another, and shoots it at him, the law says that he intends to kill him, because the killing is a result that is natural or probable or reasonable."

210 The law holds he intended the killing; the law holds it is an intentional act and an intentional result, and consequently a wilful

result; that is exactly, in short, how you get at this condition of mind. You take, for example, a case of the using of a gun. Every sane man is held to know the nature of that weapon. It is a deadly weapon made for the very purpose of destroying life; there are many other weapons that may be used for that purpose. An ax is not made for that purpose. It is made for an honest, upright, and just purpose. It is made that a man may obey the great law of nature, and earn his bread by the sweat of his brow. Yet it may be perverted from that holy and just use, so as to become a dangerous and deadly weapon, with which a life can be easily and readily taken when used purposely or intentionally in a deadly way, and death is the result of the use of it. You take the use of that weapon, the character of the weapon, and the very result produced by it, and as intelligent men you come to the same conclusion in the jury box you would come to outside of it. If you would see a man strike at another, and split his head open with an axe, you would witness that with your own eyes, as you have witnessed it here by means of the reproduction of the transaction committed by somebody by the light of this evidence that has been offered before you. If you would see an act of that kind, pray tell me, as intelligent citizens, would you conclude that the party intended the result called death? If you would do it under such circumstances you are to do it in the jury box.

Now a word in this connection as to how you may find the act was wilfully done.

211 "The presumption that the law recognizes is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary natural and probable consequences of his own act. If one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the wilful act was to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequence, and he must stand legall' responsible for it. So, where a danjerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm is a necessary conclusion from the act."

In other wo'ds:

"You take the act done; now your common observation teaches you that a gun or a pistol fired at another within shooting distance of him will put his life in danger; it may probably destroy it."

Your common observation teaches you that the use of any deadly weapon in a way to inflict a danjerous or deadly wound upon the person of another, puts the life of that person in jeopardy, and therefore from the use of such a weapon in such a way, and the production of such a result, you are authorized to say that the act was done wilfully, done intentionally. The weapon itself is inanimate. If this ax is the weapon that produced the death of these men, it hasn't any life in it; it could not of itself split open their skulls. It could not inflict dangerous and deadly wounds of that character upon them. It must be used by some intelligent agency to pro-

duce that result. Because that is so, when a result is attained when it is used, you have the right to infer that an intelligent agency was behind that ax; that he had it in his hand, that he produced that deadly result, because of an intelligent purpose upon his part to do that act. That, therefore, is the way you get at the question as to whether wilfulness
212 exists in the case, whether the act is done wilfully.

Sometimes I think I overlabor these propositions in presenting them in different forms, but I do so in order that you may make no mistakes; that you may accurately understand them. There are twelve minds that have to come to a conclusion; you all seek to reach it in an honest way, but the human mind is so constituted that different minds reach the same conclusion by different methods, by adopting a different process of reasoning, it may be, and because that is so, it is necessary, in my judgment, to present these propositions that are the very pith and substance of the crime charged, that each and every one of you may correctly understand what is meant by them, and as far as the court is concerned, it has done its full duty in giving you a correct explanation of the law.

Now I conceive that perhaps I have made this proposition sufficiently intelligent that you may comprehend it, especially in view of the fact that you have sat here for a long time, and heard these great trials progress one after the other, and heard the explanations of these expressions that enter into the crime of murder, to yourselves and other honorable jurors time and again, but each case must have its own law. As far as I am concerned, I would be perfectly willing to say to this jury, because of my knowledge of what I have said to you in other cases, that if this is a case where the killing was done willfully, and with malice aforethought, you will find the defendant guilty of murder, and if it not a case of that kind, you will find
213 him not guilty of that crime, and I believe that you would arrive at a correct understanding of the meaning of this expression, because of the number of times they have been repeated in your hearing; but I say each case must have its own law, and its own law in full, and it must stand or fall upon that law as the case is illuminated by the light of the testimony.

Now, we come to the other expression, 'malice aforethought.' I remark in this connection that if you find the existence of a case where the killing was done willfully, and there is nothing else showing that there were mitigating or justifiable facts in the case, but simply proof showing that a human life was wilfully taken, you have a right to conclude just what you would conclude in the streets or at your homes as intelligent men if you saw the case of the killing of another with a deadly weapon, and there were no other facts presented to you; you would conclude then that such a killing was murder, because you would know that the man who killed would have no right to take the life of the other man upon any consideration that can be conceived, morally or legally, and that where he took it, and no facts were presented other than the method of its being taken which showed that it was wilfully done, that would show the existence of malice aforethought. Therefore the purpose of the definition of the word 'wilfull' is twofold. First it is that you may correctly understand it and apply it to the facts in this case, so that you may see whether it exists here or not, as a substantive, necessary requisite of the crime. Secondly, if it has an existence, whether or not it makes out the other element. The same

proof that goes to show it was wilfully done, may, in the hypothetical case I have put to you, show that it was done with malice afore-
214 thought. But it is rarely the case that the condition alone ever exists; that is to say, that you have before you alone the method of the killing and nothing else. It is always characterized by other facts and other circumstances, and these facts and circumstances are of a character that enable a jury to characterize an act. Mr. Emerson says that, "the league between virtue and nature engages all things to assume a hostile front to vice. * * * Commit a crime, and the earth is made of glass. Commit a crime, and it seems as if a coat of snow had fallen on the ground, such as reveals in the woods the track of every hare, partridge, fox, squirrel, and mole. You can't recall the spoken words; you can't wipe out the foot tracks; you can't draw up the ladder, so as to leave no inlet or clew. Some damning circumstance always transpires. The laws and substances of nature, whether snow, wind, or gravitation, become penalties to the criminal." Because it is so ordained in nature, I say it seldom happens that you have before you a state of case where you have to rely alone upon the method of the killing to enable you to characterize that crime. If it be true that the killing is one with malice aforethought, if it be true that it is a killing that has been murderously and wickedly done, there are other facts and other circumstances that will go to corroborate and substantiate, to elucidate and illustrate the means used in order that an intelligent jury may come to an intelligent conclusion as to the character of that crime.

Now, we will see what malice aforethought is. In defining that I am going to express it to you in different forms, that I may the better
215 get your different minds to comprehend it. It is defined in a general way to be the doing of a wrongful act without just cause or excuse, and in such a way and under such circumstances as to show it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against the act, or that it was done in the absence of mitigating circumstances. And it is defined again as the doing of a wrongful act without just cause or excuse, and in such a way as to show that the party who did it had a heart void of social duty and a mind fatally bent on mischief.

That expression is given generally in the books as the definition of malice aforethought—the doing of an act which produces death in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent on mischief. To fill that definition out to the full measure, it is not necessary to show that it was done because of special spite or ill will, or to satisfy a grudge, or to wipe out an animosity that existed, nor to show that it was done for a desire of gain. If it was done from a state of general malevolence it is sufficient. Why? Because there rests upon every citizen what is called a social duty. It is a part of the duty that rests upon the shoulders of all of us, that we owe to our fellow men. These duties are mutual. They do not belong to one man to be exacted of another. The other has a right to exact them of that one. They are correlative with the great rights that belong to us, the right to life, the right to liberty, the right to the fruit of our toil; these are the great cardi-
216 nal natural elementary rights that each man possesses. Now, in order that they may be secured, in order that they may be possessed by the

citizen who does not forfeit them because of his own conduct and crime, it follows that these great duties must rest upon everyone else, to observe the right to life, and not only to observe that life, but to protect it rather than destroy it; to observe the right to liberty, to see that the right to liberty is fully secured to each and every man. That is what is meant by social duty. When we do an act that deprives another of the greatest right that he possesses, called his life, and that other is innocent, we must pay the forfeit with our lives, if we take that life wantonly, recklessly, and wickedly. We are forgetting the social duty that rests upon us. We therefore have a heart that is regardless of social duty when we take a life in that way, and when he takes it by means that show that condition that we have a mind fatally bent on mischief. And we have but to revert to our condition in society, our social duty, to understand that this general definition, expressed in rather twofold form, is very comprehensive and very powerful, and not likely to be understood by jurors unless illustrated and further explained, but yet exactly applicable to the condition of each and every man in society.

Let us see again how the law defines it and how it tells us it may be found to exist.

"It can only be found by circumstances, because (as I have already told you) malice aforethought, like wilfully, is something which exists in the mind, and whenever there is a thing which exists in the mind that is necessary to be found to make up the elements of the case, as you can not get in the mind to know what is going on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way, and there must be some rational way, by which
217 you may learn it, some rational way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way which is the way that the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction (and I call your especial attention to this part of it), the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration, to see what was the nature of the thing done, whether it was an innocent act or a criminal act, and if a criminal act what was the nature of that criminal act.

"Malice aforethought is the grand criterion which distinguishes murder from other homicide, and it is not so properly spite or malevolence to the deceased in particular as any evil design in general: the dictate of a wicked, depraved, and malignant heart, a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, or former grudges, and concerted schemes to do him some bodily harm. So in many cases, when no malice is expressed, the law will imply it, and when a man wilfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm; a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation. Therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows
218 out of special spite or animosity, or a specific design to take life, or the purpose to do some other wicked act of a wicked and malignant and criminal nature, which, because of its nature, and the way it is done a human life is taken malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in murder. It evinces a formed design to do mischief as may deprive a fellow-being of life.

"Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell be direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

It is the thing itself that is shown to exist. Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows its existence in the shape of the surrounding facts and circumstances in the shape of that which attends every transaction in life, which goes to characterize it one way or the other, which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime.

"There is never presented to a jury direct evidence of what was the intent of a man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind, and

the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express.

"It can not be demonstrated as express.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that
219 result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any period before the fatal blow. From the very fact of the blow being struck, we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon."

I modify that to this extent: If you find a case where a deadly weapon is used, that is a weapon with which life can be easily and readily taken, whether it be a gun, knife, or ax, or whatever it may be, if the proof shows simply the use of *of* that weapon, and there is an absence from the case of that which justifies such use of it, or of that midway position between a justifiable killing and murder, called manslaughter, in other words, that the act is not mitigated by anything being done by the party killed at the time of the killing, in such a case, if the evidence shows the wilful or intentional use of a deadly weapon which produces death, it shows malice aforethought, and it is from that source that the declaration prevailing in the law, that the proof of the killing would be proof of malice aforethought, or that it was murder, and when you come to apply the rule practically it is correct, because I say the proof of the killing necessarily shows the means used, and it shows the manner of the use of these means or it shows other facts and circumstances, such as obliteration or an attempt to obliterate evidence of the means used and the circumstances surrounding the killing which are equally potential facts going to show the existence of malice aforethought, because when you come to apply the rule practically the same evidence which shows the method of killing shows the other facts and circumstances that you may consider as evidence of malice aforethought.

220 "Malice is to be inferred from the attendant circumstances which surround the transaction, and the jury have the right, and it is their duty, to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in that act, as being the only way they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder.

"Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or wilfull act that might result in death

is evidence that may be considered by the jury as evidence of malice, and of the existence of malice aforethought. For instance, the law lays it down as a principle, if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a wicked act that might result in death is shown by the actions of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts which goes to show the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand, and whenever a party entering upon whatever unlawful or criminal enterprise he may enter upon, prepares himself with a deadly weapon, with the purpose of using it in a wicked or unlawful enterprise, if it be one of that character, enabling him to consummate and carry out that enterprise, the selection of a weapon for that purpose is evidence of the existence of malice aforethought, it is evidence of the existence of a purpose to do a wrongful act without just cause or excuse, in such a way as to show that the party who does it has a heart void of social duty, and a mind fatally bent on mischief."

The fact that he prepared himself with that deadly weapon is a fact that is to be taken into consideration to show the existence of premeditation, that is when the evidence of the killing is evidenced by the means that he prepared himself with, is evidenced by the use of these means which he had selected or prepared beforehands. Therefore, you may take into consideration, and it is your duty to take into consideration in the language of the law I have given you, all the surrounding facts and circumstances which you are to weigh and examine, to enable you as honest, intelligent, impartial citizens and jurors to characterize the nature of
221 the act done.

Now, I have defined this second expression, this second phrase that enters into the crime of murder which goes to characterize it, and I have attempted to tell you the means you may adopt to find its existence. Of course you are to go to the evidence to ascertain whether these facts and circumstances that you may take into consideration to show its existence are proven in the case. I have already told you that the principle of self-defence has been invoked in this case. Now, whether it exists or not as applicable to this case, you are to say, because your duty is to find the truth, and then to apply the principle of law that is applicable to the case. Your duty is to find first that these two cases of killing have occurred; secondly, that that killing was done by the defendant, or that these killings were done by the defendant. Then it becomes your duty to characterize it, to say whether it was a crime, or what crime it was. You are to find the facts correctly; you are to find them with that degree of accurateness that you are capable of finding them, by the application of your reason to the facts and circumstances, and if you find it to be true that the case of murder exists, that the crime of murder has been committed, and that it was committed by the defendant, and that these things are established to that degree of certainty required by the law, there is no other condition that can be applicable to the truth of the case. That, however, is for you to say, and I deem it wise, I repeat, in every case, where

by argument, these other conditions have been adverted to, that
222 you may see exactly what they are, that you may make no mistake in the case, whether the facts warrant the argument or not (that is a question for you to solve) for the court to gave the definition of these other conditions. One of them is that of manslaughter, which is the wilfull and unlawful killing of a human being without malice aforethought. It implies that the person killed, at the time of the killing, was doing some act that was provocative in its character, that had a tendency to so far provoke the mind of the party as to inflame it, and to put it in a condition where he could not conceive a purpose to take life deliberately, where he did not think of the act beforehand, a case where the party did not prepare himself with a deadly weapon beforehand to take life; if he did that, there would be evidence of premeditation, as shown by the selection beforehand and use of a deadly weapon. It means a state of case that springs into existence instantly, where the mind of the party is inflamed by some act done by the party killed that may be regarded by the law as sufficiently provocative in its character to reduce the grade of the crime from murder to manslaughter. It indicates a state of case where there is an absence of previous preparation to take life. It indicates, of course, a different state of case, from which there is an absence of any attempt to cover up the crime, as a rule, afterwards. As a general rule of human conduct, innocent men do not attempt to cover up their conduct. It grows out of a state of case as a general rule of human action, where there is no interference afterwards with the property of the party killed, but it grows out
of an inflamed condition of the human mind, that may spring into
223 existence, and that may find an abiding place in the minds of good men who act upon sudden impulse without previous preparation to take human life.

The other state of case is that of self-defence. The effect of it is to admit the killing; that is, in this case, to admit the killing of the party against whom self-defence was asserted. The effect of such a plea is that the party says I did the act, but I had to do it; I had a right to do it under the law. It is a confession, an avoidance, as we call it, in the law.

The defendant denies, of course, that he killed one of these parties, and says that he killed the other one. According to his statement he did that in such a way and under such circumstances that he had a right to do it. If that is true, under the law he is without crime. If it is not true, you are to look at the facts and circumstances; to the surrounding circumstances of the case, to see what other conditions exist. In a brief way I will define this law. I do not consider it necessary to dwell upon it at any great length. I think you have heard it repeated at least fofty times during this term of court, perhaps not so often as that, but very often, so you almost know it by heart. It means, in short, under the proposition that I have referred to, that the party who does the killing at the time of the killing was doing what he had a right to do under the law; he is without fault; he is in the lawful pursuit of his business, as the law calls it, and when in such attitude, in such a condition, he is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may
lawfully kill the assailant, provided he use all the means in
224 his power to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without

killing him, if it be in his power. This proposition embraces all of the elements that enter into the law where there is a case of actual danger to life at the time to the party who kills at the hands of the one he kills. When he is attacked by another under such circumstances that denote an intention to take his life or to do him some enormous bodily harm the law gives him the right to kill his assailant upon the law of necessity, because he can not otherwise save his own li*ght*, because he can not by any other reasonable means at hand do that which is necessary to protect his own life. It implies a case of actual danger, danger to his life that is then and there existing to his own life, then and there surrounding the party who takes the life, and it is such a condition that he can not avoid, except by flying to this d*a*rnier remedy, called the taking of a human life. In such a condition he may take a human life to save his own. The other state of case is where the danger is not real, is not actual; but the facts and circumstances, in your judgment, must be of such a character as would lead a reasonable mind to believe that the danger was actual, was real at the time he did the killing. If these facts and these circumstances were of that character, and he could not avoid what seemed to be a case of real, of actual danger, he may act upon the appearances created by these facts and circumstances as well as though they were real, as well as though they were actual. It does not mean that every man who slays can come into court and say I thought I had a right to kill, because every man
225 would say that; it does not mean the bare conception of a criminal mind; it does not mean the bare conception of an innocent mind; it does not mean the bare conception of danger or bare fear that may exist in any mind. It means that a man is surrounded by such facts and circumstances as would lead the reasonable man to believe that there was actual and real danger that could not be avoided, except by the party doing as he did do. Whenever that is the state of case the law recognizes the condition as existing that the party may act upon as in the first rule that I have given you. This is the law of self-defence. You are the better able to see by contrast when this definition is given you with the definition of murder what the condition is in the case. If you are not satisfied that this condition exists there could be no application of this principle of the law.

Now, I have defined to you these three conditions; one of the other must exist in every case where a party has taken the life of a human being. I have virtually told you in the definition of these elements that enter into the crime of murder what character of evidence you may rely upon to find the existence of the propositions that enter into the crime of murder. And that you may the better comprehend it, I propose to detain you a little while longer upon that branch of the question. There is but one positive eyewitness in this case to the occurrences which go to make up the killing and to the occurrences which may be taken into consideration by you to characterize that killing. That eyewitness is the
226 party who stands before you charged with the crime of murder. The Government produces evidence here that is of another character, evidence that is called circumstantial evidence; evidence that is sometimes declared to be evidence of the things standing around the occurrence, that reasonable men use in passing upon the affairs of life, and in coming to conclusions from them and used in a just and rational and

proper way. It is evidence that does not have eyes, yet it is often made to see; it does not have ears, yet is often made to hear; it does not have a tongue, yet it is often made to speak with almost miraculous power. It has none of these senses that can be applied by us to learn facts. It has none of these things attending it. There is another attribute that is absent from it. It is not an animate, conscious being; it has not a conscience that can be warped by interest, by motive, that can be bought or sold, that can be corroded by criminal consideration, and if it is produced before you correctly, without its ears, without its eyes, without its tongue, without its conscience to be corrupted or influences, and produced with sufficient volume, produced with sufficient proving force to equal in proving power the testimony of one credible, uncontradicted positive eye witness, the law says it is testimony that can be relied upon; the law says it is testimony that may be depended upon to prove every substantial fact in the case. In this case you have the identity of these two bodies proven by positive evidence, by men who looked into their faces, by their fathers and their acquaintances, men who knew them in life, and who swore positively from the facial resemblance to them in life after the windows of the soul—the eyes—had been closed, and the hand of death
227 had been laid upon them and that expression which makes up the countenance, that intelligence which shines out through the soul had disappeared, yet from that facial resemblance they were enabled to look upon their dead bodies and identify them as the bodies of their two sons. That is evidence of the fact; yet if they were not able to do this, suppose that the decaying finger of time had wrought its work, and that this facial resemblance had disappeared, so that these parents could not have looked into their dead faces and come here and tell you who they were, would the wheels of justice be compelled to stop because these men could not be identified by positive evidence? Not at all. They may be identified by extraneous circumstances, their clothing or any other facts and circumstances, their articles of wearing apparel, or by articles of personal property found near them; any of these means may be resorted to, yet they are purely circumstantial. So you see I use this as an illustration to show you that every fact in the case, whether it be the death, the manner of the death, the evidence as to whether that death was a crime or innocent act, may be proven by this character of evidence that I am now about to call your attention to. What is it? What character of evidence is it; or, in other words, what is circumstantial testimony? The court, in the case of the Commonwealth vs. Sturtevant, tried in Mass. in 1874, in defining it said it was indicated by the very term itself.

"It defines itself—circumstantial evidence. It is evidence from facts which stand around the main fact to be proven. Direct evidence is evidence pointing directly to the establishment of the fact."

For instance, it is necessary to prove that these men were killed
228 by being struck with an ax. If a man had seen that done, that is positive or direct evidence of it; but it is not necessary that a man should have seen that done in order to satisfy reasonable minds it was done that way, or done that way in the law by some other blunt instrument, as set up in these counts of the indictment. If the nature of the wound was of the character to satisfy you as reasonable men that it was an incised wound, a wound that was cut in the skull or neck, or wherever

the wounds where located, wouldn't that ordinarily satisfy you it was done with a sharp instrument? If so, you are to be satisfied here. Yet that is only a circumstance to show it. The proposition itself is as to how that wound was inflicted. You take the circumstances standing around there, in the shape of the character of the wounds, and you come to a rational and intelligent conclusion about it.

Again, let us see how the courts regard this class of evidence. Sometimes there is a prejudice against it, and an unjust prejudice. It arises in my judgment largely from an honest misconception of what is meant by it. There is one thing sure—if that prejudice is adhered to, you might as well close your temples of justice, because the great crimes that affect society have intent in them, and you can not prove intent in any other way, and intent must be established to prove guilt. And this way of restraining criminals from the commission of crime by the deliberate and impartial decisions of men and by the administration of punishment must exist, or that degree of violence that too much prevails, called mob violence, must take its place, because society will seek protection, the honest part of it, one way or the other, either by resorting to that which emanated
229 from the mind of Deity himself, whose mission is the harmony of the world, called law, or by applying brute force and brute violence. There is no necessity of that, because, generally speaking, intelligent and just men are called upon to administer the law, and they do it honestly and perfectly when they are properly called upon to do it and informed what their duties are by courts who have intelligence and manhood enough to do their duty, and the fault of the nonadministration of law is as largely with the courts as it is with the jury, in my judgment.

Now, here is a case I read from, decided by an eminent court in a State where the law has ripened into a high degree, almost of perfection—the State of Pennsylvania—the case of the Commonwealth vs. Udderzook, where every element in the case, even the identity of the dead body, the identity of the means used to cause that death, the connection of the defendant Udderzook with the death, the character of the act done with which he was charged, and every fact in the case had to be proven by circumstances—every one. The remains had decayed so far they could not be identified by positive evidence. The marks of violence had been so far obliterated it was impossible to ascertain what they were except by circumstances—The connection of the defendant with the transaction was purely circumstantial, and in the light of such a condition I read to you the opinion of that court upon that character of evidence.

"The case of the Commonwealth rests upon what is known as circumstantial evidence. And, indeed, where wilfull, deliberate murder, contemplated beforehand, is committed it rarely occurs that direct positive evidence respecting it exists. Perpetrated, as it usually is, by lying in wait, by means of poison, or by falling upon the victim when no one is
230 by, the only evidence must commonly be found in the circumstances attending it. And this character of evidence is ascertained by experience to be little, if any, less satisfactory than that which is known as direct or positive. Where the circumstances relied upon are properly established and the inferences arising from each one and from all of them combined point naturally in one direction there is no greater danger in following them to their conclusions than attends all human

investigations. That we may err in such cases is possible; but so we may where the evidence is direct or positive; the circumstances may possibly mislead, but so may the eyes, or the ears, or the dishonesty of witnesses.

As was said by Chief Justice Gibson, in the case of the Commonwealth v. Harman, 4 Barr., 269: "The only difference between positive and circumstantial evidence is that the former is more immediate and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both; a man may as well swear falsely to an absolute knowledge of a fact as to a number of facts, by which, if true, the question of guilt or innocence is solved. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not, therefore, to stop its wheels. Innocent men have, doubtless, been convicted and executed upon circumstantial evidence. But innocent men have sometimes been convicted and executed on what is called positive proof. All evidence is more or less circumstantial, the difference being only in the degree. And it is sufficient for the purpose when it excludes disbelief—that is, actual disbelief; for he who is to pass on the question is not at liberty to disbelieve, as a juror, while he believes as a man. It is enough that his conscience is clear."

Again, reading from the charge of the court upon the trial of George S. Twitchell, jr., at Philadelphia, in December, 1868, for the murder of Mrs. Mary E. Hill, his mother-in-law (Pamphlet Trial, pages 75–77, 1 Brewst., 570):

"Mr. Bentham tells us that all evidence flows either from persons or things.

"These are the only two sources from which we can expect testimony, and unless we resolve to let all secret crimes go unpunished, all civil disputes to remain undecided, and to throw away our reason, we must act upon the statements of persons or things. I say statements of things, because if we consult the experience of every hour we will be taught that inanimate objects have their voice as well as sentient things.

"It is in vain, then, for man to say that, because others have failed in their efforts to detect error, he will sit quietly down and perversely refuse to apply his intelligence to the problems of life, whether they encounter him in the counting room or the jury box.

"He might just as well refuse to use his legs, because others
231 have fallen or been killed in walking. He might with equal propriety refuse to eat, because others have been poisoned while partaking of nourishment.

"Some persons, admitting the force of the principle which actually compels us to act upon evidence, still insist that nothing but positive testimony should produce conviction, and, adhering tenaciously to this favorite dogma of those who are too timid or too weak to exercise their reasoning faculties with which a kind Providence has endowed them, they assail all circumstantial evidence.

"A moment's reflection, however, must satisfy all candid minds of the unsoundness of such a proposition. Suppose for a moment that this was the rule of our being, and that we had been so constituted that we could believe nothing unless it were demonstrated to us by our own senses or by

the statement of an eyewitness, what would then be our condition? Of course we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arsons, burglaries, forgeries, and other offenses could be committed with impunity; nor would the mischief stop here. Few civil controversies could be settled by juries; no book of original entries could be received in evidence; no note or obligation would avail unless there were a subscribing witness—indeed, this would not be sufficient, for if he died before trial the claim would expire with him. An insurance on the life of the witness would not even avoid the difficulty, for the policy would die with its attesting witness. For the same reason all receipts would perish with those who saw them signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witness and the magistrates before whom they were acknowledged. All proof of handwriting by comparison be annihilated; commerce would be destroyed or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime mob laws and vigilance committees would supersede the use of courts and juries, and the whole framework of society would be impaired, if not destroyed. The absurdity of the prejudice against circumstantial evidence may be still further illustrated by reflecting for a moment upon the use to which we constantly and properly apply it. Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unsees, into the reasoning which connects them with the world beyond our own. A trifling circumstance, the fall of an apple, has proved to the satisfaction of philosophers the great laws of gravitation which control the motions of the universe. The man who denies the existence of his Maker is properly regarded by many as thereby evidencing his want of reason.

"Yet what proof have we of this important and accepted truth except from circumstances? The same kind of testimony is the proof of our belief in all the great truths of revelation. If we turn from the world without to the great mechanism within us, we see again that no rational man pauses one instant to doubt the force of circumstantial testimony.

"What evidence have we that it is a heart that beats or a brain
2:32 that throbs within us, except from the fact that those organs exist in all similar' constituted beings? And we accept remedies for all the ills that flesh is heir to upon precisely the same faith in circumstantial evidence.

"Chief Justice Gibson has given an excellent illustration of the force of this kind of testimony. He says (Com. v. Harman, v. Barr, 272): 'You see a man discharge a gun at another. You see the flash, you hear the report, you see the person fall a lifeless corps; and you infer from all these circumstances that there was a ball discharged from the gun, which entered his body and caused his death, because such is the usual and natural cause of such an effect. But you did not see the ball leave the gun, pass through the air, and enter the body; * * * And your testimony to the fact of killing is thereby only inferential; in other words, circumstantial.'

"The improvements of modern science furnish us with another illustration. You are in a telegraph office and see the battery in motion. A message is received. The station at the other end of the line may be a

thousand miles distant. No human eye saw the subtle fluid pass along the wire, and yet you would hardly listen with patience to the man, or the argument, undertaking to reason to you that the message might have come through the air, or the earth, without the agency at the wire, and that all your evidence to the contrary was circumstantial, and therefore unworthy of regard.

"In short, a skepticism like this would open wide the door for the perpetration of secret crimes, would uproot our faith in man, and destroy even our belief in a Creator and in a future state.

"These are some of the evils which would flow from the declaration of a principle that we should reject all circumstantial evidence.

"In short, the courts say that when a train of circumstances are, you believe, truthfully and correctly related by several witnesses, and these circumstances, when connected together, form what is called a chain which connects a single individual with the crime charged, it is as satisfactory as the positive evidence of a person who swears he saw the crime committed."

That is the opinion of courts upon this subject of the character of this kind of evidence. It is not necessary to take up your time further, after what has been said by the court, and read from these numerous authorities, as to this class of evidence. Every proposition must be proven either by it or by positive testimony. You can not arrive at a sensible, rational, honest conclusion in any other way.

Now, what is the status of this case? I have already adverted
233 to that. Upon the side of the Government the facts are purely circumstantial. They are to be taken into consideration by you to show the fact of the killing, to show by whom that killing was done, and to show the manner of that killing. You have the right to gather them all up, and if you find when they are all taken together they are of that accusatory character that they have sufficient force to lead you to believe beyond a reasonable doubt that the charge as laid against the defendant is true, you are to take a step further to see what the facts are that you may find to be true that explain away these accusatory circumstances. If the proposition as established by the accusatory facts is one which establishes guilt beyond a reasonable doubt you are to see whether that is explained away by evidence offered upon the other side of the case. It is a principle of law that every party charged with crime is presumed to be innocent—that is to say, the jury trying him regards him as innocent until the evidence in the case, in the judgment of sensible, rational, just and impartial men, overcomes that presumption. If it is sufficient to overcome it, then there no longer prevails a presumption of innocence; it is overcome by proof showing beyond a reasonable doubt the guilt of a party. If there is no explanation or not a sufficient explanation to destroy the proving power of the accusatory circumstances, after the whole evidence has been considered together, the true eliminated from the false, if there be false in it, after that consideration of the case has been had, and there is still in it a condition where it is established beyond a reasonable doubt, the duty of the jury is to convict of whatever crime has been committed under the law. Then it is your duty, I say, to gather up all the
234 facts that are offered by the Government to sustain the charge preferred against the defendant, to see what the character of each and every fact is, though it be a circumstantial fact, to see what

it proves. And in passing upon the weight of these facts you are to apply your knowledge that you may have gained by observation in life, your knowledge of human nature as prompting human action under given circumstances, bearing in mind that it is the general rule of human conduct that the actions of the individual in the presence of a consciousness of innocence are directly the opposite of the actions of a party who is standing in the presence of a consciousness of guilt. When you come into a jury-box you are not to leave behind you your wisdom; you are not to lay aside that which you may have gained as knowledge of human nature by the observations you have made upon the conduct of men. You are to weigh the facts and circumstances in the light of these propositions I have given you. If a man is charged with a crime, and his conduct in connection with that act is of a character that shows the characteristics and conduct of a criminal, it requires some explanation upon his part. The general rule is that innocence will not be characterized by such actions. But when there is an exception to the general rule there must be an explanation that is satisfactory and reasonable as to why the party departed from the general rule of human conduct. If such an explanation is made it takes away the force of the facts and circumstances that may be accusatory in their character. If, by the light of your observation, your wisdom, and judgment, that explanation is not satisfactory, is not truthful, is not honest, that can not be depended upon either because of its nature, or the source from which it comes, then you are to consider still what may be the weight of the accusatory facts.

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Now, then, what may you take into consideration? You go to the place of the killing as a starting point and you see what the conduct of the defendant was, if you are able to see it at the time of the killing. That is what you are hunting after; that is the proposition you are to find. You very often can see that clearly by the light of subsequent conduct, sometimes as that subsequent conduct is illuminated by previous actions upon the part of the party. Therefore, in this case, you have a right to take into consideration the conduct of the defendant in attempting to conceal the bodies, because that is an act that men who have a consciousness of having committed no crime do not usually resort to. If they do resort to it, if the fact is proven to be done, or attempted to be done, it is a fact that requires explanation, coming from a truthful, reliable source, and an explanation that is so reasonable, according to your judgment of the reasonable conduct of men, that you can rely upon it before the bare fact of the concealment of the bodies as an effort to conceal the act so done can be eliminated as a proving fact from the case.

You will remember that there is a principle that has been manifest all along the line of man's existence which goes to show that there is planted in each heart a consciousness of right and wrong, and that sometimes, though no matter how much the conscience may be corroded by criminal conception or criminal thought or criminal act, this voice of conscience is still to be heard. It has been recognized as existing in this world from the time that Cain rose up against his brother and slew him, and when the Lord God said unto him, "Where is Abel, thy brother?" and he said, "I know not; am I my brother's keeper?" "What hast thou done? The voice of thy brother Abel crieth unto me from the ground." From that time until this hour a consciousness of guilt has

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prompted men to attempt to obliterate evidence of it, to deny the existence of that guilt, and because that is a well known and well recognized condition of the human heart and human mind, it is a principle that you may invoke and that you may apply in this case and in all others. Therefore, you will take into consideration the fact of the attempt to conceal the bodies of these two dead men. You may take into consideration the destruction of the property of the deceased that might lead to their identity. That is a fact that does not characterize, as a usual rule, a consciousness of innocence, because if there is a consciousness of innocence, it prompts each man who possesses it to seek vindication, not to attempt to obliterate an occurrence or the evidence of it and cover it up, and fabricate evidence in the case. His vindication is what is sought for as the prompting of that consciousness of innocence. That is one reason why it is given to him: that he may protect himself from false accusation, from suspicion created by surrounding circumstances, and he has nothing to conceal, nothing to cover up; nothing is in darkness to him. He seeks vindication, he does not flee from it; he does not flee from a jury of his country, and he undertakes to place his case before them that he may be vindicated. That is the usual rule of human conduct. The concealing of the axe as the instrument that was used to produce the deadly result, an attempt to cover up the blood marks, a failure to as soon as
237 possible make known the fact of the killing, the change of his name by the defendant as an attempt to cover up his identity, an attempt to sell the wagon and team of Samuel E. Vandevere, a failure to recognize Mr. Bolding, the father of one of the deceased men, when he saw him at the jail, the possession of the clothing of the deceased, the law says that the fruits of crime may be taken into consideration to show whether a crime has been committed or not. A man is found in possession of your horse, running away with it, trying to sell it; you have missed him out of your stable, or from your farm; the law says that he, being in possession of that property, he is called upon to explain that possession, to show that it came to him honestly and properly. If he does that, as a proving fact, the possession passes away as a proving fact; it has no longer any existence, but unless he does explain it satisfactorily and reasonably, so that you can depend upon that explanation, the fact of the possession of the stolen property is an accusatory fact of the crime of larceny, and if human life, immediately preceding the possession of the property, has been taken, and that life was possessed by the owner of the property, as an evidence that that life was taken criminally, wickedly, and in a murderous way, the possession of the property and the attempt to conceal it may become powerful evidence to show the character of the killing, to show the way it was done, to show it was done for gain, and consequently thought of beforehand. It is not necessary to detain you longer by enumerating these facts and circumstances you are to take into consideration. The case has been elaborately argued upon both sides. I think all has been said in it that could be said by mortals on either side. I say that in commenda-
238 tion of the attorneys in the case, and when that is done it is unnecessary for the court to dwell at great length in enumerating the facts and circumstances in the case; not that the court weighs the facts and circumstances, but it has a right to call your attention to them. It would have the right, under the rules of Federal procedure in courts of the U.

S., to give you the proving weight of each fact and circumstance. This court does not do that. It only calls your attention to the salient facts and circumstances on the respective sides of the case that you may have this additional method of being reminded of them, and from what you have had from the argument in the case, which is still fresh in your minds, it is unnecessary to dwell further upon them. The fact still remains whether this defendant has offered any explanation of these accusatory facts and circumstances, and if has done so it is our duty to take it into consideration. The question is, whether the defendant has given you such a statement of facts as to show that his actions were in harmony with the usual actions of innocent men, or were out of line with such actions generally, or not harmonious with the conduct of innocent men generally. You have upon one side these facts and circumstances offered by the Government, and you have upon the other side the declaration of the defendant. You are to pass upon the reasonableness of these facts and circumstances. You are to consider their combined weight. You are to do likewise with the positive statements of the defendant. In your judgment, when viewed in the light of the surrounding facts and circumstances, as shown by the evidence, are the statements of the defendant reasonable, are they probable, are they consistent? Everything that is accusatory in its nature goes to contradict the evidence that may be offered by him that tends to
239 exonerate him. In that conflict of evidence, of course, you are to see where the truth lies as you may ascertain it from the light off all the facts and circumstances in this case that you find to be true.

When circumstantial evidence is relied upon the case must be proven to the same degree of certainty that it must when positive evidence is depended upon. It must be proven to that degree of certainty that it is when you receive the uncontradicted evidence of an eye-witness, that the evidence is credible, is reliable to such an extent that you can depend upon it. If all this proof, in the shape of the conduct of the defendant, in the shape of his possession of the property, in the shape of the destruction of the property belonging to these parties, in the shape of the atttempt to conceal these bodies, in the shape of concealing the deadly instrument, the axe, if that be a deadly instrument; in the shape of attempting to dispose of this property, and in the shape of the concealment of his identity by changing his name by this defendant, these, if when considered in the light of the other facts that may be found to be true, are equal in proving power to the testimony of one credible, positive, uncontradicted eye-witness, and they show the defendant's connection with this killing, and to that extent required by the law they show the characterization of this crime, and to that extent your duty would be to convict the defendant of the crime as shown under the law to exist.

The courts have passed upon this question as to what extent the proof must go when circumstantial evidence is relied upon. "The true
240 rule is," a court in Massachusetts has said, "that the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other (not any other hypothesis as claimed in the argument, but) any other reasonable hypothesis but that of guilt; that the circumstances taken together should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable moral certainty that the accused, and no one else, committed the offence charged."

That is substantially the instruction you handed the court to read, Mr. Hodges.

Mr. HODGES (of counsel for defendant). Yes, sir; that is the law.

The COURT. That is the law, as declared and reiterated again and again by the authorities.

We have it again that the court can not be required to instruct the jury; that the jury must be satisfied that the case is proved by such a coincidence of circumstances that excludes every hypothesis except the guilt of the prisoner. The law says the court can not be required to say that to the jury, because there are a thousand hypotheses in every case; there are a thousand doubts stalking through the world that have no reason connected with them, and reasonable men kick them out of the way and pay no attention to them. It is asserted that unless they are satisfied, unless the proof excludes every other hypothesis, that they ought not to convict the prisoner. The true rule is that the circumstances must be such as to produce a moral certainty of guilt and to exclude every other reasonable hypothesis, any other hypothesis that in the light of the testimony, in the light of the law, as given by the court defining the crime, and the rules directing juries, what rules they may look at, in the light of this condition, the proof must establish the charge to a moral certainty, so as to exclude any other reasonable hypothesis.

241 The defendant has gone upon the stand, and he has given to you a statement as to this occurrence. Was that statement reasonable? Is it consistent? Is it harmonious when viewed in the light of the other evidence, and in its own light, and in the light of the usual, probable rule of human conduct and human action? You have a right to judge it, and to judge it in that way. It is your duty to do it. If, in your judgment, it is not reasonable when viewed in the light of the other facts, if it is not consistent, if it is evidence that it is false, it is evidence that is not to be relied upon, and its inconsistency is evidence of its falsity. It is highly important that you should pass upon the truth or falsity of the statements of the defendant, for if those statements be false it presents a case where he has fabricated evidence, he has falsified evidence, he has falsified the truth. The law says when that is resorted to in a case it is a foundation of presumption against the party who resorts to it, for the reason that if a man has innocence upon his side he has the truth at hand to vindicate that innocence; that is the best and surest way to do it. We are conscious of the fact that there is nothing which occurs in this world without evidence of its occurrence; nothing can transpire without it does not leave a trail of facts behind it, and these facts go to characterize the occurrence one way or the other, and we can always rely upon them. If a man kills another in self-defence he is to be vindicated. The knowledge of that fact occurring in that way leads to his vindication. Men, as a common rule, act in obedience to that consciousness of what would be the result or condition of that kind. As a rule, they do not seek to cover up the act. If they do, it is an exception to

242 to the rule, and must be explained. As a rule, they do not make away with the property of the party killed in self-defence; as a rule they do not change their identity; as a rule they do not try to flee from the country. As a rule, none of these things exist in a case of that kind, therefore, where they do exist, where they do occur as having an

existence, it becomes necessary that an explanation should be made, and you are to see whether this explanation is true or not. If it is true, it takes away the proving power of these circumstances. If it is untrue, then, by a resort to falsity, it is attempted by fraud and perjury to deceive the jury, and for that reason it is to be looked at. The law says, in looking at the testimony of witnesses of that character, you are to view him just as you would any other witness, by the light of his surroundings, by the light of his condition in the case; if he bears an attitude to the case where he is to be affected seriously by the result of it, it would not be doing justice if you did not take that fact into consideration in weighing his evidence. He is in the attitude of one charged with the crime of murder; if convicted of that crime, he must pay the penalty; he is conscious of that fact; he has the highest consideration acting upon his mind that can ever act upon the mind of man, a consideration arising from a desire to save his own life. It has been said all along the ages that a man will give the world for his life. It is the highest right that he possesses, and when he is in an attitude that his life may be imperiled, because of the act charged against him, and he appears as a witness, and states facts, you are to weigh those facts in the light of that attitude; if they are true facts, if they are honest facts,
243 they will harmonize with the other truths in the case, because the truth is always harmonious; every relevant fact in this case that is true must be in harmony with every other fact. There is no war between different parts of the truth. It is only among falsehoods that war is waged, and between truth and falsehood. That is one of the best methods, it is one of the strongest and most powerful means we have of arriving at the truth. If we find what the truth is in the case, then we see what other assertions are in harmony with it; if they harmonize with it reasonably and probably, so as to bring about a state of consistency, the statements of course are strengthened; they are affirmed or corroborated by this mighty power called truth. If they are not in harmony with this truth, that is evidence of their falsity, evidence of their being untrue. Therefore, you are to pass upon the testimony of a witness in the light of its own reasonableness, of its own consistency. If it is inconsistent in its own light, it is not probable when viewed alone, and if it is not reasonable or consistent when viewed in the light of the other facts in the case, and in the light of his attitude and surroundings, his probable motive that would bring into existence a desire to have you believe favorable to his case, the law says you are at liberty to disregard such parts of the statement as you see proper, and believe such other parts of it as you may see worthy to believe in the light of all the other facts and circumstances. "But (Greenleaf on Evidence, Redfield's edition, Vol. 1, 247, sec. 218) if, after the whole statement of the prisoner is given in evidence, the prosecutor may
244 contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases, where one part of the evidence is contradictory to another. For it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. If what he said in his own favor is not contradicted by evidence offered by the prosecutor, nor improbable in itself, it

will naturally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case."

That is the view you are to take of evidence of that kind.

Gentlemen of the jury, but little remains to be said by the court. I have defined to you the crime of murder, and I have defined to you the crime of manslaughter, and I have defined to you the condition when self-defense exists in the case. It is for you to take the evidence in this case and to see from the whole testimony whether you are satisfied beyond a reasonable doubt that crime has been committed. If a crime has been committed, and that crime is the crime of murder, as defined by the court, as given by the law of the land, you have no right to drop down in your finding from that crime to one of less grade, because when that transpires, when that is done, there is a violation of the oath that you have taken to try this case according to the law and the evidence, and you have no more right to enter into a compromise with crime than the court has, or that any other citizen has. Your first duty is to find whether a crime has been committed, and if so, your second duty is, with equal care, with equal justness, with equal precision, to correctly and honestly under the law define the character of that crime. If that crime, as shown by the light of these circumstances, was committed by this defendant, and was committed in such a way as evidenced by his conduct afterwards, or at the time, or in connec-
245 tion with the transaction, it is the crime of murder, because it shows it was thought of beforehand, that it was premeditated, that it was committed for plunder, for gain, it would be your duty to find the defendant guilty of murder. If that condition does not exist and the other one does, it would be your duty to find what condition does exist, and apply that condition as defined by the law and the facts of the case.

I give you now the forms of verdicts you may find, and the court reminds you, as it has already told you, that there are two crimes charged here in four counts of this indictment. I have already enumerated them. If you find that this this killing of Samuel E. Vandevere was done by cutting his head with an axe, and done in a criminal way, with the sharp part of the axe, or any other sharp instrument, your finding would be under the first count. If you find that he was killed, and killed by the defendant in a criminal way, and with the pole of the axe, or any other blunt instrument, your finding would be under the second count of the indictment. If you find that the defendant killed William D. Bolding, killed him by cutting his head with the sharp part of the axe, or any other sharp instrument, and killed him in a criminal way, your finding as to that killing would be under the third count of the indictment. If you find that Bolding was killed, and killed in a criminal way by the defendant, by the use of a blunt instrument, such as the pole of an axe, or any other blunt instrument, your finding with relation to him would be under the fourth count of the indictment. I have drawn forms here that you are to follow in according to your finding, and write on the count of the indictment that you may find upon. If you find the defendant guilty the form of your verdict
246 will be this: We, the jury, find the defendant, John Pointer, guilty of as charged in the count of the indictment. Signed one of your number as foreman. If you find the defendant guilty of killing William D. Bolding, you will say what you find him guilty of, and

under what count you find him guilty, as: We, the jury, find the defendant, John Pointer, guilty of as charged in the count of the indictment. If you find the defendant not guilty of any crime the form of your verdict will be this: We, the jury, find the defendant not guilty as charged in the within indictment.

Now, gentlemen, you are to find this case proven before you can find guilt, to a certain extent, not absolutely, not to a demonstration, not positively, but to that degree of certainty that there is banished from the conclusion all doubts for which a good reason can be given, or in other words to a moral certainty, or to that high degree of probability that satisfies reasonable men upon matters of like importance, of like concern, as affecting others. The law says that when a case is carried to that point where it is no longer confronted—not by any doubt, but by a reasonable doubt, because we do not regard these things called doubts unless they are reasonable, unless they are substantial, unless they are based upon such facts and upon such reasons as that a reasonable man would believe the doubt to be a substantial doubt. In other words, a doubt to be regarded as against a conclusion of guilt in a case of this kind must be a real, substantial doubt of guilt, flowing naturally and reasonably to the minds of the twelve gentlemen trying the case from the whole evidence in it. If there is
247 no longer that kind of doubt in it, it is carried beyond the field of doubt that is to be regarded; it is then in the field of conviction and belief; it is then in that condition where it is proven to a moral certainty, and to such a degree of certainty as that you are to take it as established.

Then take this case; examine the evidence; remember the principles of law that the court has given you. Disregard every other consideration but that sense of duty that rests upon you and upon myself. God knows that if it was in our power to declare innocence we would be glad to do it, yet, at the same time, our sense of duty commands us to see what the charge is, and what the truth is, and to proclaim that truth as we may find it, no matter what the consequences are. We did not create them. If we had had the creation of the case it would not have existed. Then take the case, examine the evidence, give it that reasonable consideration that I know you will, and do that equal and exact justice that the law commands you to do. If there has been crime committed, if the law has been violated, if murder has been committed, the majesty, the dignity and supremacy of the law of the land enacted for your protection, as well as the protection of others, must be upheld; it must be vindicated.

You will take the case and make up your verdict.

Mr. HODGES (of counsel for the defendant). We except to that portion of your honor's charge that relates to the killing of two men, two distinct murders, both being tried at once.

We except to that part of your honor's charge instructing the jury with relation to kindred instruments; that you can charge a man is
248 killed with an axe and prove he was cut with a razor. That is not the law, as we understand it. Of course it is the law in this case.

We also state that the charge to the jury that it is not necessary for the proof to show motive for the killing is improper, and misleading to the jury.

The COURT. You except to that?

Mr. HODGES (of counsel for defendant). Yes, sir; we except to that.

We object and except to the reading of cases as your honor read in the charge, because each particular case must have a charge applicable to the facts of the case.

We also except to the method of instructing the jury to exclude manslaughter and self-defense in order to reach a conclusion that was without manslaughter.

The COURT. The court did not instruct that way.

Mr. HODGES (of counsel for defendant). That is the exception we make. As to whether it is in the charge or not we can examine afterwards.

Again, our exceptions go on with reference to——

The COURT. You can consider them all saved.

249 The defendant then and there in the presence of the jury excepted to the said charge generally and specially. The special exceptions to which the court's attention was then and there called were as follows:

First. Defendant excepted to all that portion of the charge which submits to the jury for their consideration two distinct offences, to wit: The murder of Samuel E. Vandever in the first count in the indictment, and the murder of William D. Bolding in the third count in said indictment, upon which defendant had been arraigned.

This charge is error, because the court had refused to require the district attorney to elect and because defendant can not be tried for two murders at one time.

Second. Defendant excepts to the charge, which is as follows:

"If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of the court. If you believe that the bodies were found at a point twelve miles east of Hartshorn and three miles west of Wilburton and twenty-seven miles east of South McAlister, and from one-half to one-fourth of a mile *so* south of the Choctaw railroad track, such place would be in the territorial jurisdiction of this court."

This charge is error because there is no evidence before the jury as to whether the place where the killing was done was within the western district of Arkansas or not. The proof showed that the two dead men were killed on a creek in the Choctaw Nation at a place twelve miles east of Hartshorn and three miles west of Wilburton and twenty-seven miles east of South McAlister and from one-fourth to one-half of a mile south of the Choctaw railroad track. This was all the evidence, as to

250 venue. The court can not legally tell the jury that a certain place on a certain creek is within the jurisdiction of the court for the western district of Arkansas.

Third. That part of the charge that instructs the jury that in finding the existence of malice and motive, "It is not necessary that the proof show that a motive for the act done existed."

This charge is not the law, and is calculated to mislead the jury to the injury of the defendant.

Fourth. Defendant excepts to that portion of the charge that refers to the facts of other cases, to wit: "So, also, for smallest plunder, murders have been deliberately executed. We have an illustration of this in the trial of Muller in England, in 1873, for the murder of Briggs. Briggs'

watch was seen by Muller in a railway car; Briggs was asleep, the watch was exposed, and Muller killed Briggs by a sudden attack and succeeded in making his escape. He was arrested, convicted on circumstantial evidence, and before execution confessed the crime to the warder. Until the confession the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." This charge is improper. Not a plain statement of the law, but a statement of facts that is likely to prejudice the jury against the defendant.

Fifth. Defendant excepts to all of that portion of the charge which defines and explains accidental killing. There was no proof to justify such charge.

Sixth. Defendant excepts to all that part of the charge read from the case of George S. Twitchell, jr., tried at Philadelphia in December, 1863.

251 Seventh. The charge altogether fails to present the law of the case. It nowhere defines murder or manslaughter, as those offenses are defined in the law. The charge totally fails to give the statutory definition of manslaughter.

Eighth. The charge is altogether vague, uncertain, and is so voluminous that a juror of ordinary understanding could not understand what the court meant. The charge does not apply the law to the facts of the case, and tell the jury under what state of facts the defendant would be guilty and under what state of facts he would not be; hence defendant excepts to said charge in whole and in part as specified.

Eighth. Be it remembered the jury returned the following verdict:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment. (Signed) F. M. Barrick, foreman."

"We, the jury, find the defendant, John Poiater, guilty of murder as charged in the third count of the indictment. (Signed) F. M. Barrick, foreman."

Upon which defendant was remanded to jail to await final sentence.

Ninth. Defendant filed a motion for a new trial on the 30th day of M'ch, 1892, as follows:

(Caption omitted.)

Now comes the defendant, John Pointer, and moves the court to grant him a new trial in the above cause for the following reasons, viz:

1st. Because the court erred in overruling def't's motion to quash the indictment upon which def't was tried and convicted.

252 2nd. Because the court required the defendant to select a jury by making his challenge from a list of 37 names when there were other regular jurors in attendance upon the court.

3rd. Because the court erred in allowing the dist. att'y, over the objections of the def't, to tell the jury, in stating the Government's case, that the Government expected to prove that the defendant, John Pointer, had been charged with theft of a horse in Mo., and because of a requisition from that State to Arkansas def't left Eureka Springs for Texas in Sept., 1891.

4th. Because the court overruled defendant's motion asking that the dist. att'y be required to elect upon which count in the indictment the Government would claim a conviction and proceed with the prosecution.

5th. Because the court erred in its charge to the jury, as fully appears from defendant's bill of exceptions to the same, which is here referred to and prayed to be considered a part hereof.

6th. Because the verdict of the jury is not supported by the evidence in that there was no proof before them that showed the offense to have been committed within the western district of Arkansaw.

Wherefor' the defendant prays the court to grant him a new trial.

C. J. DAVIS & J. C. HODGES,
*Att'ys for Defendant.*

Which motion the court overruled, and in overruling made the following remarks:

253 In the circuit court of the United States within and for the western district of Arkansas. February term, 1892.

UNITED STATES
*vs.* } Murder.
JOHN POINTER.

RULING OF THE COURT ON MOTION FOR NEW TRIAL.

SATURDAY, *April 30th*, 1892.

PARKER, *J.:*

In this case there is a motion pending for a new trial, and a motion in arrest of judgment. The first ground set out in the motion for a new trial is:

"Because the court erred in overruling defendant's motion to quash the indictment upon which defendant was tried and convicted."

The indictment, in my judgment, has every requisite under the law that makes it good, and, therefore, there was no error upon the part of the court in overruling that motion to quash.

The second ground, as set out in the motion for a new trial, is:

"Because the court required the defendant to select a jury by making his challenges from a list of 37 names, when there were other regular jurors in attendance upon the court."

Under the law the defendant has a right to 20 challenges, and the Government to 5. The law contemplates that there must be a
254 sufficient panel of generally qualified jurors in order to enable the respective parties to a suit, or to a case, to make their full number of challenges, and to leave 12 jurors after the challenges have been exhausted. The number of jurors presented to the defendant was 37. It was a matter entirely immaterial to the defendant how many other jurors might have been in attendance upon the court, or whether they were qualified or disqualified. If a qualified list of 37 jurors was presented to him from which he made his challenges, or had a right to make them, that is all that the law contemplates or requires. I suppose it is meant by this second ground for a new trial that there were other jurors here who were qualified generally for the purpose of taking the place of other jurors who might from sickness be disabled to sit as jurors, or who might be disqualified in a particular case. That is a matter that the defendant had nothing to do with. In the judgment of the court the reasons set out in the second ground are not sufficient to cause the court to interfere with the verdict.

The third ground, as set out in the motion for a new trial, is:

"Because the court erred in allowing the district attorney, over the objection of the defendant, to tell the jury, in stating the Government's case,

that the Government expected to prove that the defendant, John Pointer, had been charged with theft of a horse in Missouri, and because of a requisition from*m* that State to Arkansas defendant left Eureka Springs for Texas in September, 1891." That is a mistake as to what did occur. The record shows that the district attorney, in making his statement of the case, said that: "He then went back to Texas (referring to Samuel E.
255 Vandevere, one of the deceased), the defendant accompanying him, and William Bolding, the other deceased. The defendant had some trouble up in Missouri, was charged with some things that we will not claim here now"—which last remark of the district attorney was objected to by counsel for the defendant, on the ground of its being improper, which objection was overruled by the court, to which ruling of the court the defendant then and there duly excepted.

That is the only statement I know of that was made by the district attorney anything like the proposition asserted in the motion for a new trial. The record shows a very different proposition from the one set out in the third ground for a new trial. The third ground for a new trial will have, therefore, to be disregarded as a statement that did not occur in the statement of the district attorney.

The third ground for a new trial, as set out in the motion, is:

"Because the court overruled defendant's motion asking that the district attorney be required to elect upon which count in the indictment the Government would claim a conviction, and proceed with the prosecution."

There are two counts in the indictment in this case, charging two separate offences. The proof in the case shows that they are offences of the same character, and that they occur'ed at the same time and place, and that they were most certainly connected. When that is the case the law of the United States provides that there may be not only a joinder, but it makes it the duty of the court to consolidate, for the purpose of trial, charges of that character. Section 1024 of the Re-
256 vised Statutes, relating to charges joined in one indictment, is that:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, they may be properly joined. Instead of having several indictments the whole may be joined in one indictment in separate counts. And if two or more indictments are found in such cases the court may order them to be consolidated."

The law certainly does not require that to be done which would give a party the right to compel th*he* Government to ignore, in the trial, one of these charges properly joined. That would be worse than nonsense. It provides that the charges may be joined in order to save expense and trouble of more than one trial. It provides that they may be joined, and when joined tried together. In the judgment of the court there is nothing in the fourth ground for a new trial that should cause the court to interfere with the verdict of the jury.

The fifth ground for a new trial, as set out in the motion, is:

"Because the court erred in its charge to the jury, as fully appears from defendant's bill of exceptions to the same, which is here referred to and prayed to be considered a part hereof."

It is a very difficult matter to say what is meant by that. There is nothing pointed out. The court, in justice to itself, should require the objectionable part of the charge to be set out in the motion, and that not being done the court shall have to reject the fifth cause.

The sixth cause why a new trial should be granted, as set out in the motion, is:

257 "Because the verdict of the jury is not supported by the evidence, in that there was no proof before them that showed the offense to have been committed within the western district of Arkansas."

The place where the offence was committed was definitely located, and it was located at a point, geographically speaking, within the jurisdiction of this court. It was clearly shown by the evidence where these bodies were found. It was left as a matter of inference to the jury as to whether they were killed at that place, or near that place, from the swore facts and circumstances. That proposition was clearly laid before the jury, and they passed upon it. In order to find the verdict they did they, presumably, must have been satisfied that the proof was sufficient on that point.

The motion for a new trial will be overruled.

258 Defendant filed a motion in arrest of judgment as follows:

(Caption omitted.)

Now comes the defendant in the above cause and moves the court to arrest the judgment in this cause for the following reasons, viz:

1st. Because the indictment upon which the defendant was tried and convicted is insufficient in law and does not sustain the judgment rendered upon it.

2nd. Because the verdicts upon which the judgment was rendered find the defendant, John Pointer, guilty of two distinct offenses, to wit: One, the murder of Samuel E. Vandever; and the other, the murder of William D. Bolding.

Wherefore the defendant prays the court to arrest and set aside the judgment.

C. J. DAVIS & J. C. HODGES,
*Att'ys for Deft.*

Which said motion was *both* overruled by the court, and in overruling the same made the following remarks:

259 In the circuit court of the United States within and for the western district of Arkansas, February term, 1892.

UNITED STATES
*vs.* } Murder.
JOHN POINTER.

RULING OF THE COURT ON MOTION IN ARREST OF JUDGMENT.

SATURDAY, *April 30th*, 1892.

PARKER, J.:

In this case there is a motion to arrest the judgment, and the first cause set out therein is:

"Because the indictment upon which the defendant was tried and convicted is insufficient in law and does not sustain the judgment rendered upon it."

It is very difficult to tell what is meant by that. In my judgment the indictment is sufficient.

The second cause set out in the motion to arrest the judgment is:

"Because the verdicts upon which the judgment was rendered find the defendant, John Pointer, guilty of two distinct offenses, to wit: One, the murder of Samuel E. Vandevere; and the other, the murder of William D. Bolding."

That, of course, is based upon the idea that the two charges can
260 not be tried together. This is the same cause as that set out in the fourth cause for a new trial in the motion for a new trial, and the same remarks made by the court upon that cause will apply to this ground in the motion to arrest the judgment.

The motion to arrest the judgment will be overruled.

To which the defendant, by his counsel, excepted.

Ninth. The court rendered the following sentence:

261 In the circuit court of the U. S. for the western district of Arkansas, Feb. term, 1892.

SATURDAY MORNING, 8½ o'clock, *April 30th*, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
*vs.*
JOHN POINTER. } Indictment for murder, No. 37.

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, John Pointer, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 26th day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Pointer to be taken hence and him, the said John Pointer, safely and securely keep from the date hereof until Tuesday, the 28th day of June, A. D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock
262 in the forenoon and five o'clock in the afternoon, on Tuesday, the said day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

And it is further considered by the court, that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

(Caption omitted.)

Ordered by the court that sentence be suspended on the third count of this indictment, on which the said defendant was tried and convicted by the jury for the killing of Wm. D. Bolding.

To all of which said rulings, sentence, and judgment the defendant by his counsel excepted and gave notice of appeal to the Supreme Court of the United States of America, and defendant here renders his bill of exceptions, and prays that the same may be signed and made a part of the record in this cause, which is accordingly done.

(Signed) I. C. PARKER,
*U. S. District Judge, holding the Circuit Court.*

Filed April 30th, 1892.

263 In the Supreme Court for the United States of America.

JOHN POINTER, PLAINTIFF IN ERROR,
*vs.*
THE UNITED STATES, DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the defendant's motion to quash the indictments upon which plaintiff in error was tried and convicted. The indictment does not commence, "In the name and by the authority of the United States of America." Said indictment does not show upon its face that it was presented by a grand jury empaneled by the United States court for the western district of Arkansas. Said indictment does not show upon its face that it was presented in a court having jurisdiction to try the offense charged in the indictment.

2. The court erred in requiring the plaintiff in error to take a list of names of jurors, thirty-seven in number, not to exceed twenty, and the jury before whom he would be tried would be the first twelve left on the list provided, the Government did not strike out any, but could strike five, making it impossible for plaintiff in error to know whom he was passing on as jurors in his case. Plaintiff in error was not tendered a jury of twelve men, as the law always demands of the prosecution in a capital case.

3. The court erred in overruling plaintiff in error's motions asking that the prosecuting attorney be required to elect upon which count in the indictment the prosecution would claim a conviction. The indict-
264 ment contains four distinct counts, each charging the offense of murder.

4. 1st. The court erred in its charge to the jury in all rsspects as herein assigned.

All that part of the charge which calls the attention of the jury to two distinct offenses and makes it the duty of the jury to find two verdicts, each for murder.

The charge reads: "The defendant, John Pointer, in this case stands before you charged with having committed two murders. The two first counts having reference to the killing of Samuel E. Vandever, and they only differ in the manner of killing."

"The third count in the indictment charges the killing by the defendant, John Pointer, of William D. Bolding."

2nd. The court erred in its charge wherein it instructed the jury with reference to the jurisdiction. The charge reads: "In addition, it must be shown that the act of killing was committed within the jurisdiction of this court. That is, within the geographical jurisdiction within the country over which this court has jurisdiction, or, in other words, done in the western district of Arkansas. If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of this court."

"The bodies were found on a creek in the Choctaw Nation, Indian Territory. Whether in the western district of Arkansas or in the eastern district of Texas, there is no proof to show. The court could not know judicially that the place on the creek where the bodies were found was within the western district of Arkansas. Hence the charge was erroneous.

3rd. The court erred in defining malice and in instructing the jury how they might discover its existence. The charge reads: "At this point
265 it becomes necessary for us to ascertain what is meant by the expression 'wilfully and with malice aforethought,' because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime. There can be no crime of this kind without them. It is necessary, therefore, for us to understand with precision and accuracy exactly what the law means by them, because they have a legal meaning. They have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case, or the truth of the case, that you as intelligent, impartial, and dispassionate citizens are able to arrive at a just and correct and honest conclusion. In finding their existence it is not necessary that the proof should show a motive for the act done existed."

Just the reverse of this charge is the law; the proof ought always to show the existence of malice. The manner of proving its existence might be a matter upon which the court could properly instruct the jury. This charge is misleading and hence erroneous.

4th. The court erred in reading as a part of its charge to the jury the facts and circumstances of other murder cases, as will fully appear from the following language used in the court's charge, which was read from decisions of other courts: "So, also, for small plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller in England in 1873 for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep, the watch was exposed, and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime of murder.

Until the confession the justice of the conviction was largely criti-
266 cised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great."

This charge is not a plain, logical statement of the law applicable to the facts in proof, but an exaggerated statement of another case in a manner well calculated to influence the minds of the jurors against the prisoner and to convict without sufficient evidence and hope for a confession from the prisoner to prove the correctness of their verdict.

5th. The court erred in reading as part of a charge it had previously given in the case of the United States vs. Boyd & Stanley, in which the court gave the law applicable to a case where the defense claimed the killing was accidental. No such defense was relied upon; hence erroneous and misleading.

6. The court erred in explaining the law of manslaughter, in that it was an effort on the part of the court to convince the jury by an argument that the defendant was not guilty of that offense, but of murder.

Fifth. The charge as a whole is so voluminous and argumentative that it made it impossible for a juror of ordinary understanding to know from the charge what the law of the case was as applied to the facts in the case before the jury. The charge all taken together is not a plain logical statement of the law of the case as plaintiff in error was entitled to have the jury instructed. The court's comment on the law of manslaughter and accidental killing was misleading in this: there was no facts in proof to warrant such a charge. Plaintiff here refers to the entire charge as appears in the record, and upon that makes this general assignment of errors.

267 Sixth. The court erred in overruling plaintiff in error's motion in arrest of judgment, which motion is as follows, to wit:

(Caption omitted.)

Now comes the defendant in the above cause and moves the court to arrest the judgment in this cause for the following reasons, to wit:

1st. Because the indictment upon which the defendant was tried and convicted is insufficient in law and does not sustain the judgment rendered upon it.

2nd. Because the verdicts upon which the judgment was rendered find the defendant, John Pointer, guilty of two distinct offenses, to wit, one the murder of Samuel E. Vandever, and the other the murder of William D. Bolding.

Wherefore, the defendant prays the court to arrest and set aside the judgment.

C. I. DAVIS AND J. C. HODGES,
*Att'ys for Def't.*

The indictment against plaintiff in error is in words and figures as follows, to wit:

268 UNITED STATES OF AMERICA, }
*Western District of Arkansas:*

In the circuit court, February term, A. D. 1892.

UNITED STATES }
*vs.* } Murder.
JOHN POINTER. }

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Samuel E. Vandiveer, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer with a certain axe, which said axe

he, the said John Pointer, in his hand then and there had and held, then and there feloniously, wilfully, and of malice aforethought, did strike, cut, penetrate, and wound him, the said Samuel E. Vandiveer, in and upon the right side of the head of him, the said Samuel E. Vandiveer, giving
269 to him, the said Samuel E. Vandiveer, then and there, with the axe aforesaid, in and upon the right side of the head of him, the said Samuel E. Vandiveer, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound, he, the said Samuel E. Vandiveer, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer, him, the said Samuel E. Vandiveer, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

270 *2nd count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Samuel E. Vandiveer, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer, with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully, and of malice aforethought, did *did* strike, beat, bruise, and wound him, the said Samuel E. Vandiveer, in and upon the right side of the head of him, the said Samuel E. Vandiveer, giving to him, the said Samuel E. Vandiveer, then and there, with
271 the axe aforesaid, in and upon the right side of the head of him, the said Samuel E. Vandiveer, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said Samuel E. Vandiveer, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer, him, the said Samuel E. Vandiveer, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

272 *3rd count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of

Arkansas aforesaid, with force and arms, in and upon the body of one William D. Bolding, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said John Pointer with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully and of his malice aforethought, did strike, cut, penetrate, and wound him, the said William D. Bolding, in and upon the right side of the head of him, the said William D. Bolding, giving to him, the said William D. Bolding, then and there, with the axe
273 aforesaid, in and upon the right side of the head of him, the said William D. Bolding, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said William D. Bolding, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer, him, the said William D. Bolding, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

274 *4th.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Pointer, on the 25th day of December, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William D. Bolding, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Pointer, with a certain axe, which said axe he, the said John Pointer, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did *did* strike, beat, bruise, and wound him, the said William D. Bolding, in and upon the right side of the head of him, the said William D. Bolding,
275 giving to him, the said William D. Bolding, then and there, with the axe aforesaid, in and upon the right side of the head of him, the said William D. Bolding, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said William D. Bolding, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Pointer him, the said William D. Bolding, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
*United States Attorney, Western District of Arkansas.*

(Indorsed:) No. 37. United States vs. John Pointer. Murder. A true bill. Lewis R. Hawkins, foreman. Witnesses: P. B. Bolding, Eureka Springs, Ark.; W. R. Vandiveer, near Keeter, Texas; James Wilkinson, near Keeter, Texas; John H. Neal, Wilburton, I. T.; Wm. G. Beard, 4 mi. west Wilburton, I. T.; Wm. Snow, 4 mi. west of Wilburton, I. T.; John Brown, Harrellton, Ark.; W. B. Gillett, McAlister, I. T.; John Lutz, McAlister, I. T.; W. J. Vandiveer, near Keeter, Texas; J. C. Symon, 3 mi. west Wilburton, I. T.; H. C. Flippo, Wilburton, I. T.; Peter Adamson, Wilburton, I. T.; Jack Phillips, 4 mi. west Wilburton, I. T.; Oliver B. Fetter, 4 mi. west Wilburton, I. T.; Minnie Jones, Hartshorn, I. T. Filed Feb'y 9th, 1892. S. Wheeler, clerk. By I. M. Dodge, D. C.

276 Plaintiff in error's motion in arrest of judgment should have been sustained, because the indictment upon which he was tried is bad, on account of the following reasons, to wit:

1st. It does not commence "In the name and by the authority of the United States of America," as required by law.

2nd. It does not show on its face to have been presented by a grand jury empaneled in the district or circuit court of the United States for the western district of Arkansas.

3rd. It does not show that it was presented in a court having jurisdiction of the offense charged.

Seventh. The judgment should have been arrested because it does not follow the verdict of the jury and could not be plead in bar of another prosecution against this plaintiff in error, charging him with the murder of William D. Bolding.

The verdict of the jury and the judgment of the court is as follows, to wit:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment. (Signed:) F. M. Barrick, foreman."

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count of the indictment. (Signed:) F. M. Barrick, foreman."

277 In the circuit court of the U. S. for the western district of Arkansas, Feb. term, 1892.

SATURDAY MORNING, 8½ o'clock, *April 30th*, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES }
*vs.* } Indictment for murder, No. 37.
JOHN POINTER. }

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, John Pointer, was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the

jury in this cause, on the 26th day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Pointer to be taken hence, and him, the said John Pointer, safely and securely keep, from the date hereof, until Tuesday, the 28th day of June, A. D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours
278 of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

(Caption omitted.)

Ordered by the court that sentence be suspended on the third count of this indictment, on which the said defendant was tried and convicted by the jury for the killing of Wm. D. Bolding.

279 Eighth. The court erred in entering judgment, sentencing plaintiff in error to death under the proceedings herein, to all of which proceedings plaintiff in error excepted, and now assigns such and all of said proceedings as error and prays the honorable Supreme Court of the United States of America to assume and exercise appellate jurisdiction herein, to examine, review, reverse, and remand this cause with an order that the indictment herein filed against plaintiff in error be quashed.

JOHN POINTER,
By C. J. DAVIS and
J. C. HODGES,
*His Attorneys of Record in the Trial Court.*

280 In the circuit court of the United States for the western district of Arkansas.

THE UNITED STATES }
vs. Murder. Indictment No. 37.
JOHN POINTER. }

To STEPHEN WHEELER,
*Clerk of the Circuit Court of the United States*
*for the Western District of Arkansas:*

Your petitioner, John Pointer, would most respectfully show:

That heretofore, on the 9th day of Feb'y, 1892, he was indicted by the Federal grand jury in the western district of Arkansas, charging petitioner with the offence of murder.

That on the 26th day of March, 1892, he was tried upon said indictment in said circuit court, and found guilty of the offence of murder.

That afterwards, to wit, on the 30th day of April, 1892, the judge of said court sentenced your petitioner to death, as a penaltey for the crime of which he had been found guilty by a jury.

Petitioner avers that great and manifest injustice was done him in the trial of said cause by the court in its rulings and charge to the jury, and all of which rulings and charge was duly excepted to by petitioner, and are assigned as errors, as fully appears from petitioner's assignment of errors herewith filed and referred to.

Petitioner avers that he now has the right to have judgment of
281 the circuit court of the United States for the western district of Arkansas reviewed, reversed, and remanded by the Supreme Court of the United States of America.

Wherefore, petitioner now asks that a writ of error to the Supreme Court be allowed and that the clerk of the circuit court aforesaid be required to send to the clerk of the Supreme Court of the United States a correct transcript of the record in said case, including the assignment of errors herewith filed.

And that the sentence of death now against petitioner be suspended until the Supreme Court of the United States shall pass upon the errors assigned by petitioner as a reason for a reversal of the said case against petitioner John Pointer in the above else.

JOHN POINTER,
By C. J. DAVIS and
J. C. HODGES,
*His Attorneys of Record in the Circuit Court of the United States, Western District of Arkansas.*

282 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the western district of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America and John Pointer a manifest error hath happened, to the great damage of the said John Pointer, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] STEPHEN WHEELER,
*Clerk of the Circuit Court of the United States for the Western District of Arkansas.*

Allowed by—

283 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Wm. H. H. Clayton, esq., United States district attorney for the western dist. of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein John Pointer, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Isaac C. Parker, judge of the district court of the United States, this 7th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

ISAAC C. PARKER,
*U. S. Dis. Judge, Holding Circuit Court.*

On this day of , in the year of our Lord one thousand eight hundred and ninety , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to .

Sworn to and subscribed the A. D. 18 .

I hereby accept service of the within citation June , 1892.

WM. H. H. CLAYTON,
*U. S. Dist. Att'y for the Western District of Arkansas.*

285 UNITED STATES OF AMERICA,
*Western district of Arkansas:*

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the record in the case of United States versus John Pointer, indicted for murder.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Fort Smith in said district this 7th day of June, A. D. 1892.

[SEAL.] STEPHEN WHEELER,
*Clerk of the U. S. Circuit Court for the Western District of Arkansas.*
By I. M. DODGE,
*Deputy Clerk.*

(Indorsed on cover:) Case No. 15058. W. Arkansas. C. C. U. S. Term No. 759. John Pointer, plaintiff in error, vs. The United States. Filed June 18, 1892.

Office Supreme Court U. S.
FILED.
NOV 8 1893
JAMES. H. McKENNEY.
CLERK.

RECORD CASE NO. 15058.

# SUPREME COURT

—OF THE—

## United States of America,

OCTOBER TERM, 1893.

**Term No. 759**

## JOHN POINTER, Plaintiff in Error,

VS.

## The UNITED STATES, Deft. in Error.

*In Error to the Circuit Court of the United States for the Western District of Arkansas.*

BRIEF FOR APPELLANT IN ERROR.

By JACOB C. HODGES,
Paris, Texas.

S. B. MAXEY,
of Counsel.

# In The SUPREME COURT

## For the United States of America,

OCTOBER TERM, 1893.

JOHN POINTER, Plaintiff in Error,

vs.

The UNITED STATES, Deft. in Error.

*Error to the Circuit Court of the United for the Western District of Arkansas.*

STATEMENT OF CASE.

At the July term of the United States Circuit Court, held at Ft. Smith, Ark., plaintiff in error, John Pointer was by the grand Jury for said Court indicted for the murder of Samuel E. Vandiveer and William D. Bolinger at the Choctaw Nation, I. T., on the 25th day of December, 1891.

The indictment contains four counts: First and second charges the murder of Samuel E. Vandiveer; third and

fourth counts charge the murder of Wm. D. Bolinger.

On March the 23d, at said term of the Court, plaintiff in error was tried on all four counts in said indictment.

On March 26th, 1892 the jury in said case return a verdict in the words as follows:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count in the indictment. F. M. BARRICK, Foreman."

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count in the indictment.

[Signed] "F. M. BARRICK, Foreman."

Upon the return of said verdicts the jury was discharged and defendant remanded to custody to await final sentence.

Plaintiff in error filed motions for new trial, and, in arrest of judgment, which was on the 30th of April, 1892, overruled and sentence passed upon appellant as follows:

Saturday morning, 8:30 o'clock, April 30th, 1892.

Court met persuant to adjournment. Present, the Hon. Isaac C. Parker, Judge of the District Court of the United States for the Western District of Arkansas.

UNITED STATES, /
vs. Indictment for murder, No. 37.
JOHN POINTER. \

On motion of Wm. H. H Clayton esq., Attorney for the Western District of Arkansas, the said defendant, John Pointer, was brought to the bar of this Court in custody of the marshal of said District, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore rendered against him by the jury in this cause, on the 26th day of March

1892, shall not be pronounced against him, he says, that he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the Court well and sufficiently understood, it is considered by the Court that the said marshal of the District aforesaid cause the said John Pointer to be taken hence, and him, the said John Pointer, safely and secure kept from the date hereof until Tuesday, the 28th day of June, A. D., 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this District, to be appointed by said marshal, and then and there between the said hours of nine o'clock in the forenoon and five o'clock, on Tuesday, the said day of June, in the year of our Lord one thousand, eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

And it is further considered by the Court, that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution thereof.

And the clerk of this Court is here required to furnish the marshal of this District with a duly certified copy of this judgment, sentence and order, which shall be returned by said marshall with a full and true account of the execution of the same.

The plaintiff in error gave notice of appeal, and filed his petition praying for writ of error to the Supreme Court of the United States of America, which was allowed, and a writ of error issued on the 7th day of June, 1892. Transcript was filed in the Supreme Court of the United States on the 18th day of June, 1892.

On the 2nd day of October, 1893, in the Circuit Court for the Western District of Arkansas, the following pro-

ceeding were had, viz:

In the Circuit Court of the United States for the Western District of Arkansas, August Term, Tuesday morning, 8:30 o'clock, October 2, A. D., 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, Judge of the District Court of the United States for the Western District of Arkansas.

THE UNITED STATES OF AMERICA,

vs.

JOHN POINTER.

A motion having been duly noticed by the United States District Attorney for the Western District of Arkansas, to amend the record of this case, and said notice of motion having been duly served upon the attorneys for the defendant, John Pointer, and upon the defendant himself, and the motion coming on to be heard, the defendant being personally present in Court, and the Court, having its attention called to the record made and entered in this case on March 23rd, 1892, and it satisfactorily appearing to the Court upon inspection of said record so made and entered that the same is not a full and correct record of the proceedings then had, and that it does not fully and clearly appear from said record how the jury upon the trial of this case was empaneled.

NOW, THEREFORE, The defendant and his attorneys having had given due notice of said motion, and the defendant being present and making no opposition thereto, on motion of the District Attorney this Court, upon its recollection of the said proceedings now orders and directs that the record be and the same is hereby amended nunc protunc as of March 23, 1892, by striking out of the record of the proceedings on said March 23,

1892, after the words "the clerk called the entire jury of the petit jury," the words "and after challenge by both plaintiff and defendant, the following were selected"; and substituting therefor the words following, to wit:

The persons summoned as petit jurymen were then duly examined as to their qualifications in open Court, and in the presence and view of the defendant and his counsel, and the defendant by himself and his counsel were then and there given by the court the fullest opportunity to ask any and all jurymen so called any and all questions touching their qualifications, and thirty-seven of the persons summoned were thus found to be qualified to sit in this case; whereupon the Court furnished the District Attorney and the counsel for the defendant with lists of persons so qualified, (the names on the printed lists of persons not so qualified being stricken out by the clerk), and directed them to exercise their right of permptory challenge by striking off said lists—the District Attorney not over five names, and the defendant by himself and his attorneys not over twenty names, respectively, and directed that such striking off of names should be done by each separately and apart from the other (but in the court room, the prisoner and jurymen being there present), so that neither should know what names were struck out by the other until the challenges were completed; and directing that the first twelve names remaining on said lists of qualified jurymen, not peremtorily challenged by either party, should be the jury for the trial of this cause; whereupon, in the manner aforesaid, five men were challenged by the District Attorney, and twenty men by the prisoner's counsel, and two of whom (being the fourth and twenty-fifth names on said on said list), by both, and the first twelve men whose names

were left unchallenged were thereupon duly empaneled, to wit:

* * * * * * *

and sworn to try the cause.

Plaintiff in error now moves the Court to strike the above nunc protunc order from the record in this case.

Because the Circuit Court was without jurisdiction to make said order.

AUTHORITIES.

Jones vs. Graves Sewing Mach. Co., Appendix to U. S. cl.

Muller vs. Ehlers, Supra.

Genneris vs. Bonnemer, 7 Wall, 565.

Flanders vs. Tweed, 9 Wall, 425.

Reed vs. Gardner, 17 Wall, 409.

Certainly the Court was without jurisdiction to dispute plaintiff in error's bill of exception, which had been duly presented and allowed in words as follows:

Third—The defendant was furnished with a list of jurors, thirty-seven in number, generally qualified under the law, that he might make his challenges from the list of thirty-seven of any number not to exceed twenty, and at the same time the prosecuting attorney had a duplicate list of the same names, from which he could challenge any number not to exceed five. The defendant objected to this manner of selecting a jury: first, because it was not according to the rule prescribed by the laws of the State of Arkansas; second, because it was not the rule practiced by the common law courts; third, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guaranteed by the statutes of the United States, had been exhausted; fourth, because the Government did not tender to the de-

fendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know the twelve men before whom he was to be tried were, until after his right to challenge was ended.

New York & N. E. R. R. Co. vs. Hughes, 56 Federal Reporter, page 188, 143, U. S. 283.

Upon an examination of the record printed for the Supreme Court, plaintiff in error, now in his brief, assigns the following errors for which he insists the judgment herein ought to be reversed, to wit:

First—There is no evidence in the record that any judgment was ever rendered upon the verdict of the jury in this case.

Second—The record shows that there was no final judgment rendered upon the verdict of the jury.

Third—The verdicts of the jury as shown by the record was not such findings as is required to authorize a judgment and sentence of death against plaintiff in error.

We will consider the three above assignments together.

STATEMENT FROM THE RECORD.

On the 26th of March, 1892, the jury returned into Court the following verdict, viz.:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment. [Signed] F. M. Barrick, Foreman"

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count in the indictment. [Signed] F. M. Barrick, Foreman.

Sentence was pronounced as herein before stated.

We submit that the record above quoted shows that

the jury found the plaintiff in error guilty of two distinct offences, to wit:

First—The murder of Samuel E. Vandiveer.

Second—The murder of William D. Bolinger.

The only penalty for the offence of murder which the statutes of the United States imposes is death. See Art. 5359, Revised Statutes of the United States.

Our contention is that before the Circuit Court of the United States for the Western District of Arkansas could legally pronounce the death penalty upon plaintiff in error, as the record shows was done in this case, certain things must have been done which the record fails to show in this case, to wit:

First—Plaintiff in error must have been indicted in a court of competent juristiction for the offence of murder.

Second—Legally tried and convicted by a jury legally impanelled to try plaintiff in error for the offence of murder.

Third—The jury must return into Court a verdict of finding the defendant guilty of murder of one and only one human being.

Fourth—The verdict must be received and recorded upon the records of said Court.

Fifth—The Court must render a judgment upon said verdict adjudging the plaintiff in error guilty of the offence of murder as found by the verdict of the jury.

When all the above requisites affirmatively appear of record then, and not until then, was the Court authorized to pronounce the death penalty upon plaintiff in error as appears was done in this case. See Record, page 145.

In support of the correctness of the above propositions we cite Chit. Criminal Law, page 720, Lewis vs.

The United States, reported in Supreme Court Reporter Vol. 13, Note Jan. 16, 1893.

If our conclusions of law are correct then the only, legitimate inquiry left for us in considering assignments first, second and third is: Does it affirmatively appear from the record that all things necessary to be done before the death sentence was pronounced, was done? We think not.

First—The record no where shows that the verdict was received and recorded.

Second—There is no record of any judgment adjudging plaintiff in error guilty of murder.

The only record in regard to the verdict is on pages 4 and 5, as follows:

Saturday Morning, March 26th, 1892.

On this day came the United States of America, by Wm. H. H. Claton, esq., attorney for the Western District of Arkansas, and come said defendant, in custody of the marshal, and by his attorneys, J. C. Hodges, esq., and I. C. Davis, esq., and now come the jury heretofore empanelled for the trial of this cause, in charge of a sworn bailiff of this Court, to wit: * * * * who took their seats in the jury box, and after receiving the charge of the court retired in charge of the sworn bailiff aforesaid to consider their verdict, and after some time returned into the court the following verdicts, to wit:

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the first count of the indictment.

"[Signed] F. M. Barrick, Foreman."

"We, the jury, find the defendant, John Pointer, guilty of murder as charged in the third count of the indictment.

"[Signed] F. M. Barrick, Foreman."

It is only by inference that it appears from the record that the verdict was received. Surely there is no evidence that it was recorded.

The only evidence that the Court ever rendered judgment upon the verdict is on page 145, as follows:

Saturday morning, 8:30 o'clock, April 30th, 1892.

Court met persuant to adjournment. Present, the Hon. Isaac C. Parker, Judge of the District Court of the United States for the Western District of Arkansas.

UNITED STATES, vs. JOHN POINTER. } Indictment for murder, No. 37.

On motion of Wm. H. H. Claton, esq., Attorney for the Western District of Arkansas, the said defendant, John Pointer, was brought to the bar of this Court in custody of the marshal of said District, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore rendered against him by the jury in this cause, on the 26th day of March, 1892, shall not be pronounced against him, he says, that he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the Court well and sufficiently understood, it is considered by the Court that the said marshal of the District aforesaid cause the said John Pointer to be taken hence, and him, the said John Pointer, safely and secure kept from the date hereof until Tuesday, the 28th day of June, A. D., 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this District, to be appointed by said marshal, and then and there between the said hours

of nine o'clock in the forenoon and five o'clock on Tuesday, the said day of June, in the year of our Lord one thousand, eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

And it is further considered by the Court, that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution thereof.

And the clerk of this Court is hereby required to furnish the marshal of this District with a duly certified copy of this judgment, sentence and order, which shall be returned by said marshall with a full and true account of the execution of the same.

Is the above such judgment and sentence as authorize the taking of human life? We think not, and in support of position we submit the following argument:

If we take from the record the words "Indictment for murder, No. 37," which is but a caption, and not a part of the judgment, then read carefully, we would be unable to tell from the judgment of what offence plaintiff was indicted and tried. If we read the words "Indictment for murder, No. 37," as a part of the judgment then we are unable to tell from the judgment of what offence plaintiff was found guilty by the jury, for which the death penalty is pronounced. Under an indictment for murder the jury may find the defendant guilty of manslaughter or an assault with the intent to kill. Revised Statutes of the United States. Art. .

We submit that a death warrant following the judgment and sentence, as it is called in the record, would not show for what offence it demanded the taking of plaintiff in error's life.

To show how absurd it would be to allow a human being, deprived of his life under the proceedings of this case, if the court should affirm the judgment of the Circuit

Court and order the plaintiff in error executed. The execution might read aloud from the scaffold the entire judgment sentence and death warrant, yet plaintiff in error and those who witness the execution could not tell from the reading of said judgment, sentence and death warrant for what offence plaintiff in error was being hanged.

We think that the failure of the Circuit Court to receive and record the verdict and render judgment adjudging plaintiff in error guilty of the offence of murder is a fundamental error, for which the judgment must be reversed and the cause remanded. It may be that the view of the case here presented leaves it open to the Supreme Court to remand the cause with a order to the circuit court to give judgment on the verdict, but in view of other errors assigned, which we will now consider as we do not care to discuss this question.

STATEMENT.

Under I. assignment as contained in the record.

I. The Court erred in overruling the defendant's motion to quash the indictments upon which the plaintiff in error was tried and convicted. The indictment does not commence "In the name and by the authority of the United of America." Said indictment does not show upon its face that it was presented by a grand jury empaneled by the United States Court for the Western District of Arkansas. Said indictment does not show upon its face that it was presented in a court having jurisdiction to try the offense charged in the indictment.

While it appears that the indictment was presented by grand jurors of the United States of America, duly selected, empanelled, sworn and charged to inquire in and for the body of the Western District of Arkansas, it does not appear affirmative that they were empanelled by the

Circuit or District Court of the United States for the Western District of Arkansas. Neither does it appear from the face of said indictment, nor from the file mark thereon, to have been presented in the Circuit Court of the United States for the Western District of Arkansas. The file mark as appears in the record, page 157, filed February 9th, 1892, S. Wheeler, Clerk, by I. M. Dodge, D. C. We do not know any legal meaning the abreviation "D. C." has in law. If it could be construed to mean District Court. Certainly the abreviation "D. C." could not mean United States Western District of Arkansas. There is no entry in the record showing the return of said bill of indictment into the Circuit Court of the Western District of Arkansas, by a grand jury. If the Court should assume that the indictment was filed in the Circuit Court of the Western District of Arkansas, then we submit that if the indictment had gotten lost before the trial, the records would have been silent as to the return of Indictment No. 37, charging John Pointer with the offence of murder.

That the bill of indictment and the records of the Court should show affiirmatively that it was presented and filed in the Circuit Court of the Western District of Arkansas, we submit the following authorities:

Bishop Criminal Proced., Vol. 1, Paragraph 36; 4 Sharswood Blackst. Comm. 301; 4 Cranch. 167.

PLAINTIFF IN ERROR'S SECOND ASSIGNMENT.

"Second—The Court erred in requiring the plaintiff in error to take a list of names of jurors, thirty-seven in number, and strike out any number, not to exceed twenty, and the jury before whom he would be tried would be the first twelve left on the list provided. The Government did not strike out any, but could strike out five, making it im possible for plaintiff in error to know whom he was passing on as jurors in his case. Plaintiff in error was not

tendered a jury of twelve men, as the law always demands of the prosecution in a capital case." Record, page 6.

STATEMENT.

MR. HODGES—The defendant some time ago was served with a list of thirty-seven jurors, and on the 16th of March he was served with an additional list. We do not understand that in a case of this magnitude the jurors can be served by peace meal, and desire to object to the method of serving.

THE COURT—In the first place the list of thirty-seven was served, and it always happens that some of the thirty-seven cannot serve, by reason of incompetancy or sickness, and out of an abundance of precaution we have the additional list served on the defendant, so that there will be a sufficient number served to go on with the trial of the case, without waiting for two day's service on the defendant when the case is called for trial. It is not service by peace-meal, but service of additional talesmen.

MR. HODGES—I will just state, so that I will not appear captious, that in cases of this magnitude we deem it best to save all the exceptions possible, and hence I will note that.

Our exception is that we object to being required to announce, without being served with a full list of jurors, that is, we do not announce at all, but are forced over our objection.

The jury was then examined as to their qualifications, and thirty-seven men were found to be qualified to sit on the case; whereupon the Government and the defendant were each furnished with a list of the thirty-seven men so selected, and each were required to strike out those they did not wish to serve, the defendant being allowed to strike out twenty names and the Government five.

Mr. Hodges (of counsel for the defendant)—I desire to save an exception to this method of forming the jury. It does not follow the State law of Arkansas, neither does it follow the common law, and we except to it on that ground. The point we make is that the Government must offer us the twelve men they want to try the case. Record, page 7.

It fully appears from the above record that at the time the Court forced plaintiff in error to trial and compelled his counsel to challenge from the list of thirty-seven names. He then and there excepted to the manner of empanelling the jury:

First—Because the method by which the plaintiff in error's counsel was forced to proceed to empanel a jury was not according to the methods prescribed by the statutes of the State of Arkansas, in which the court was being held.

Second—Because it was not in conformity to the rules practiced at common laws.

Third—Because the defendant could not know the particular jurors before whom he was to be tried until after his challenges was exhausted.

Fourth—Because the Government did not tender to the defendant a jury, but tendered seventeen jurors and and thereby made it impossible for the defendant to know the twelve before whom he was to be tried until all his challenges were exhausted.

The exceptions call the attention of the court to the error before any challenges had been made.

Our contention is that the method by which the plaintiff in error was required to select the jury before whom he was tried deprived him of his rights as they existed at common law, and as now exist where the United States Court fails to follow the statutes of the State in which the Court is being held. We do not claim that the Circuit Court of

the Western District of Arkansas could not prescribe rules for empanelling jurors in capital cases different from those prescribed by the statutes of Arkansas, but we do contend that when the Circuit Court of the United States prescribes rules different from those of the States in which the Court is held, and the rules are so directed or prescribed. The practice so prescribed must not conflict with or abridge rights of defendant as they existed at common law.

The evil in the method prescribed by the Court is apparent in this. If the plaintiff in error challenged twenty, there were just left seventeen names on the list, and if the Government counsel should challenge none, then the first twelve would constitute the jury; but if he should challenge the first five and the defendant the next twenty then the last twelve on the list would constitute the jury. Or if each challenged the same there would remain seventeen names on the list. Hence, after the plaintiff in error had, by the method prescribed, challenged twenty jurors, he could not tell who the jury would be until they were called into the box, when, for the first time, plaintiff in error would be confronted with the jurors before whom he would be tried.

Our contention is: That when a Circuit Court of the United States fails to conform to the methods prescribed by the statutes of the State in which the court is held in empanelling a jury in a capital case, then any method that conflicts or abridges the right of a prisoner upon trial for his life as they exist at common law, is error for which the Supreme Court ought to reverse a case.

And we contend that any method that does not require each juror called into the box in the presence of the Court and prisoner, and a fair and full opportunity given to the

prisoner to then and there inspect and question each juror and in the presence of the court exercise his right of challenge according to his own peculiar prejudice, is abridging a prisoner's rights as they exist at common law.

## AUTHORITIES.

Alexander vs. U. S., 138, V. S., 353.

Lewis vs. United States, Supreme Court Reporter, page 136, Vol. 13, No. 6, Jan. 16th, 1893, and authorities there cited.

### THIRD ASSIGNMENT OF ERROR.

"The Court erred in overruling plaintiff in error's motion asking that the prosecuting attorney be required to elect upon which count in the indictment the prosecution would claim a conviction. The indictment contained four distinct counts, each charging the offence of murder."

### STATEMENT FROM THE RECORD.

The defendant filed a motion praying the Court to require the District Attorney to elect upon which count in the indictment he would claim a conviction.

"Now comes the defendant, John Pointer, and moves the Court to now require the Government's counsel to elect upon which count or counts in the indictment he will now try defendant.

"Defendant demands that he be informed affirmatively who he is being tried for murdering before his attorneys are required to cross-examine any witness offered by the Government.

"Wherefore defendant prays that this cause proceed no further until the District Attorney elects upon which count in the indictment he will try the defendant." See Record, page 5.

The Court overruled the motion. Record, page 6.

When all the evidence was offered plaintiff in error's attorney again moved the Court require the District Attorney to elect upon which count or counts he would proceed. See Record, page 108.

It appears from the record that the Court was of the opinion, after the verdict was returned, that the plaintiff in error had been convicted of two distinct offences. First, the murder of Samuel E. Vandiveer; and second, the murder of William D. Bolinger.

For the first named offence the Court sentenced plaintiff in error to death, and entered the following order as to the second.

(Caption omitted).

Ordered by the Court that sentence be suspended on the third count of this indictment, on which the said defendant was tried and convicted by the killing of William D. Bolding.

To all of which said rulings, sentence and judgment the defendant, by his counsel, excepted and gave notice of appeal to the Supreme Court of the United States of America, and defendant here renders his bill of exception, and prays that the same may be signed and made a part of the record in this cause, which is accordingly done.

I. C. PARKER,
U. S. District Judge, holding the Circuit Court.

Filed April 30th, 1892.

We submit that the judgment and sentence should be as broad as the finding of the jury and the court by its judgment should dispose of the entire case tried. Hence we conclude the Court ought to have required the District Attorney to elect and try plaintiff for the murder of one person, or, at least have the jury make one finding.

We submit that there can be no special finding in capital cases upon which the court can give judgment to suit its idea of the law. But the finding must be a general verdict of guilty or not guilty, and judgment must be rendered upon the verdict as returned, reciting the verdict in the judgment.

## AUTHORITIES.

Black on Judgments, Vol. 1, page 142.

Marder vs. Wright, 70, Lowd, page 42, 29, N. W. Rep. 799.

Bishop on Statutory Crimes, second ed., 348.

Bishop Crim. Proceed., second ed., Vol. 1, page 443, 1001.

Bishop Crim. Proceed., second ed., Vol. 2, page 641.

1 Chit. Crim. Law, 635, 636.

### FOURTH ASSIGNMENT OF ERRORS.

"4. 1st. The court erred in its charge to the jury in all respects as herein assigned.

"All that part of the charge which calls the attention of the jury to two distinct offences and makes it the duty of the jury to find two verdicts, each for murder.

"The charge reads: 'The defendant, John Pointer, in this case stands before you charged with having committed two murders. The first two counts having reference to the killing of Samuel E. Vandever, and they only differ in the manner of killing.'

" 'The third count in the indictment charges the killing by the defendant, John Pointer, of William D. Bolding.'

"2nd. The court erred in its charge wherein it instructed the jury with reference to the jurisdiction. The charge reads: 'In addition, it must be shown that the act of killing was committed within the jurisdiction of this court. That is, within the geographical jurisdiction with-

in the country over which this court has jurisdiction, or, in other words, done in the western district of Arkansas. If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of this court.'

"'The bodies were found on a creek in the Choctaw Nation, Indian Territory. Whether in the western district of Arkansas or in the eastern district of Texas, there is no proof to show. The Court could not know judicially that the place on the creek where the bodies were found was within the western district of Arkansas. Hence the charge was erroneous.'

"3d. The court erred in defining malice and in instructing the jury how they might discover its existence. The charge reads: 'At this point it becomes necessary for us to ascertain what is meant by the expression "wilfully and with malice aforethought," because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime. There can be no crime of this kind without them. It is necessary, therefore, for us to understand with precision and accuracy exactly what the law means by them, because they have a legal meaning. They have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case, or the truth of the case, that you, as intelligent, impartial and dispassionate citizens are able to arrive at a just and correct and honest conclusion. In finding their existence it is not necessary that the proof should show a motive for the act done existed.'

"Just the reverse of this charge is the law; the proof ought always to show the existence of malice. The manner of proving its existence might be a matter upon which the court could properly instruct the jury. This charge is misleading and hence erroneous.

"4th. The Court erred in reading as a part of its charge to the jury the facts and circumstances of other murder cases, as will fully appear from the following language used in the court's charge, which was read from decisions of other courts: 'So, also, for small plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller in England in 1873 for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep, the watch was exposed and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence and before execution confessed the crime of murder.'

"Until the confession the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great.'

"This charge is not a plain, logical statement of the law applicable to the facts in proof, but an exaggerated statement of another case in a manner well calculated to influence the minds of the jurors against the prisoner and to convict without sufficient evidence and hope for a confession from the prisoner to prove the correctness of their verdict.

"5th. The court erred in reading as part of a charge it had previously given in the case of the United States vs. Boyd & Stanley, in which the court gave the law applicable to a case where the defence claimed the killing was accidental. No such defence was relied upon: hence erroneous and misleading.

"6th. The court erred in explaining the law of manslaugher, in that it was an effort on the part of the court to convince the jury by an argument that the defendant was not guilty of that offence, but of murder.

"Fifth—The charge as a whole is so voluminous and argumentative that it made it impossible for a juror of ordinary understanding to know from the charge what the law of the case was as applied to the facts in the case before the jury. The charge, all taken together, is not a plain, logical statement of the law of the case as plaintiff in error was entitled to have the jury instructed. The court's comment on the law of manslaughter and accidental killing was misleading in this; there was no facts in proof to warrant such a charge. Plaintiff here refers to the entire charge as appears in the record, and upon that makes this general assignment of error.

We believe this case ought to be reversed because of errors in the charge as set out in the above assignment, which was duly excepted to at the time they were given. See Record, pages 140, 141 and 142.

Proposition under paragraph 2 of assignment 4, above stated.

The trial Court could not judicially know that a certain place at an obscure location on a certain creek in the Choctaw Nation, I. T., was within the geographical jurisdiction of the western district of Arkansas. Hence the court erred in instructing the jury as follows:

"If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of this court. If you believe that the bodies were found at a point twelve miles east of Hartshorne, and three miles west of Wilburton, and twenty-seven miles east of South McAlester, and from one-half to one-fourth of a mile south of the Choctaw railroad track, such a place would be in the terri-

torial jurisdiction of this court. That, then, is the first proposition to be found."

THIRD PARAGRAPH, FOURTH ASSIGNMENT.

"Third. The court erred in defining malice and in instructing the jury how they might discover its existence. The charge reads: 'At this point it becomes necessary for us to ascertain what is meant by the expression "wilfully and with malice aforethought," because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime. There can be no crime of this kind without them. It is necessary, therefore, for us to understand with precision and accuracy exactly what the law means by them, because they have a legal meaning. They have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case, or the truth of the case, that you, as intelligent, impartial and dispassionate citizens are able to arrive at a just and correct and honest conclusion. In finding their existence it is not necessary that the proof should show a motive for the act done existed.'"

"Just the reverse of this charge is the law; the proof ought always to show the existence of malice. The manner of proving its existence might be a matter upon which the court could properly instruct the jury. This charge is misleading and hence erroneous."

Our contention is that just the reverse of the charge is the law. Proof of malice ought always to show motive for the homicide. The facts necessary to prove motive and malice are for the jury. But when the Court instructs a jury that the proof need not show motive for a homicide, we think it commits error and is misleading.

PARAGRAPH 4 OF FOURTH ASSIGNMENT.

"4th. The Court erred in reading as a part of its charge to the jury the facts and circumstances of other murder cases, as will fully appear from the following language used in the court's charge, which was read from decisions of other courts: 'So, also, for small plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller in England in 1873 for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep, the watch was exposed, and Muller killed Briggs by a sudden attack, and succeeded in making his escape. He was afterwards arrested, convicted on circumstantial evidence, and, before execution, confessed the crime of murder.

"Until the confession the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great.'

"This charge is not a plain, logical statement of the law, applicable to the facts in proof, but an exaggerated statement of another case in a manner well calculated to influence the minds of the jurors against the prisoner and to convict without sufficient evidence and hope for a confession from the prisoner to prove the correctness of their verdict."

The above assignment of error presents the point we make. Certainly the trial Court ought not to have recited the facts and history of any case other than the one on trial, and then, in effect, tell the jury if they would convict the defendant, that after his conviction he would probably do like "Muller," confess his guilt of the crime and thereby satisfy the jury and public that the conviction was just.

PARAGRAPH 6 OF FOURTH ASSIGNMENT.

"The Court erred in explaining the law of man-

slaughter, in that it was an effort on the part of the Court to convince the jury by an argument that the defendant was not guilty of that offence, but of murder."

Our contention is that manslaughter is a statutory offence, defined by Articles 5340 and 5346, Revised Statutes of the United States. Hence all that part of the charge upon the crime of manslaughter, which defines involuntary manslaughter as that offence as known to common law is error. Manslaughter, for which the Congress has fixed a penalty, is defined in the Articles above referred to, as follows:

Sec. 5341. Every person, who, within any of the places or upon any of the waters described in Section fifty-three hundred and thirty-nine, unlawfully and willfully, but without malice, strikes, stabs, wounds or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter.

Sec. 5344. Every captain, engineer, pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his duties on such vessel, the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct or violation of law, the life of any person is destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years.

Plaintiff also filed a general assignment of errors as follows:

"The charge as a whole is so voluminous and argumentative that it made it impossible for a juror of ordi-

nary under standingto know from the charge what the law of the case was as applied to the facts in the case before the jury. The charge, taken all together, is not a plain logical statement of the law of the case as plaintiff in error was entitled to have the jury instructed. The court's comment on the law of manslaughter and accidental killing was misleading in this; there was no facts in proof to warrant such a charge. Plaintiff here refers to the entire charge as appears in the record, and upon that makes this general assignment of errors."

We understan l that such general assignment will not be considered, and only such parts of the courts charged as are complained of should appear in the record. But in this case the triai Court desired the entire charge put in the record, hence it was put in.

Counsel for plaintiff in error is in no way responsible for the entire facts of the case being put in the record.

Since the entire charge appears in the record we respectfully ask that the Court determine if it is not subject to the general exception herein. We believe the charge taken as a whole, is erroneous.

Court may see how it may have missled the jury to to the injury of the plaintiff in error.

LAST ASSIGNMENT.

"Now comes the defendant in the above cause and moves the court to arrest the judgment in this cause for the following reasons, to wit:

"1st. Because the indictment upon which the defendant was tried and convicted is insufficient in law and does not sustain the judgment rendered upon it.

"2nd. Because the verdicts upon which the judgment was rendered find the defendant, John Pointer, guilty of two distinct offences, to wit: One, the murder of Samuel

E. Vandever, and the other the murder of William D. Bolding.

"Wherefore, the defendant prays the court to arrest and set aside the judgment."

The point raised by this assignment has been discussed in another part of this brief.

We respectfully ask that the Court allow this brief filed and that the same be considered.

JACOB C. HODGES,
For Plaintiff in Error.

S. B. MAXEY,
of Counsel.

CASE NO. 15058.

# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN POINTER, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES. } No. 759.

**IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.**

## BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted for the murder, on December 25, 1891, of Samuel E. Vandiveer and William D. Bolding, at the Choctaw Nation, in the Indian Territory. The three were young men and had long been friends.

STATEMENT OF FACTS.

It appeared that the prisoner, who had resided at Eureka Springs, in northern Arkansas, left there under a charge of horse-stealing in Missouri, and went with these young men, one of whom lived there, to the home of the latter, near Aurora, in the State of Texas; that, while in Texas, the prisoner was again in trouble on a charge of carrying firearms; that in December, 1891, the prisoner, hearing that Vandiveer and Bolding had started on a return trip to Eureka Springs, went after them and joined them. They traveled with two horses and a wagon, and on the 25th had reached the place of the homicide, which was in the outskirts of Wilburton, in the Choctaw Nation, close by the railroad, and about 27 miles from South McAlester. On the following day the bodies of the deceased were found, thrown into the bed of the creek, close by the place where they had camped. The skull of Vandiveer was found crushed by one blow of an instrument like an ax. The head of Bolding showed three heavy blows, apparently with an ax, and also the throat was cut with some sharp instrument. Defendant immediately afterwards was found in South McAlester, under the name of Longley, trying to sell the horses and wagon for $150. When arrested, he said "Hold on, partner; I am not standing no trial now;" and added, "A man has got to be proved guilty before he is a criminal" (p. 43). He was found with the money of the deceased, and with the watch and part of the clothes belonging to one of them. He made no statement on his

side of the case until the trial, refused to answer to his real name, and denied acquaintance with the father of Bolding.

On the trial he claimed that Bolding had killed Vandiveer and that he himself had killed Bolding with an ax in self-defense. His story, which will be found at pages 82 to 102 of the record, is intrinsically very improbable.

## ARGUMENT.

### FIRST.

The first assignment of error relates to the overruling of defendant's motion to quash the indictment. The motion was made on four grounds, three of which are specified in the assignment.

(1) That the indictment did not commence "In the name and by the authority of the United States of America."

(2) That it did not show on its face that it was presented by a grand jury impaneled by the United States court for the western district of Arkansas.

(3) That it did not show on its face that it was presented in a court having jurisdiction to try the offense charged in the indictment.

The caption of indictment is: "United States of America, western district of Arkansas, in the circuit court," and it recites that the grand jurors were "duly selected, impaneled, etc., to inquire in and for the body of the western district of Arkansas aforesaid." It states the crime to have been committed "at the Choctaw Nation, in the Indian country, within the western district of Arkansas."

It would seem unnecessary to do more than refer to section 1025 of the Revised Statutes, directing that no such indictment shall be deemed insufficient " by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

**SECOND.**

The second assignment of error is based on the method of impaneling the jury, which was in general character like that adopted in the cases of *Alexander* v. *United States* (138 U. S., 353); and *Lewis* v. *United States* (146 U. S., 370). The court handed lists of the names of the jurors, containing thirty-seven names, to the prisoner's counsel and the district attorney, directing them to strike off twenty and five names, respectively, stating that the jury before whom the prisoner would be tried would be the first twelve left on the list. The point wherein error is claimed is that " plaintiff in error was *not tendered a jury of twelve men* as the law always demands of the prosecution in a capital case " (p. 146). It may be that the challenges were secretly made as inferred by the court in the Lewis case; but there is nothing in the record in this case to show it. The words, " without knowledge," etc., upon which the court based its decision in the Lewis case, are not in this record.

The reason for the adoption of the Lewis case procedure was stated by Mr. Justice Parker (before the decision in that case) at page 258 of the record in the case of *John Brown* v. *The United States*, No. 758 on this calendar, as follows:

> I desire to say that one of the strong considerations that induced the court to adopt this method is one

which I think is well sustained in the experience of every lawyer. A panel of gentlemen are brought in here from all parts of the district; they are honest and conscientious men. Under the method adopted in some courts there are twelve men placed in the jury box, and the Government announces whether it desires to challenge any of them for cause, and if it does it names the man—"Mr. Smith, you will stand aside." When Mr. Smith stands aside the panel is filled up again. If the Government does not desire to make any more challenges, it is passed over to the defense, and it announces its peremptory challenges, or its challenges without cause. Now, take a long term of court, such as we have here, and, while there may be no real foundation for it, sensitive men are touched by this condition, and we very often see it manifested. They get the idea that the lawyer pointed them out in the assembled crowd of people at the court, and that it is a sort of stigma upon them, and it creates more or less feeling in their minds against the man who offers the objection in that way. Before the term is half over there is probably half of the panel that are not in the best frame of mind toward the attorney who may have challenged them. Every lawyer knows this to be true. That was largely the reason that prompted this court, among other reasons, to adopt this rule. The challenges are made secretly by each party, neither knowing who the other challenges, and no juror knows who challenges him, and he has no ground to have any feeling toward this lawyer or that, or against any client. It is the best method, in my judgment. It has been adopted, too, for a great many other reasons that are not necessary to be stated; but I will state this: That there were certain practices that had grown up that were reprehensible that were broken up by this method. I

> think the method of challenge is fair, impartial, and unbiased, for no consideration can enter into it, except a desire to carry out the will of the client on the part of counsel. I make this statement so that if these questions are to be passed upon by the Supreme Court, it may understand why this rule has been adopted here.

The bill of exceptions is so curiously framed that it is hard to say precisely what occurred in the trial or in what order. It begins as follows (p. 5):

> Be it remembered that in the trial court before the Hon. I. C. Parker, the following proceedings were had, *to all of which* the defendant, John Pointer, then and there excepted.

The proceedings are then divided into nine headings, as follows:

"First." Motion to quash the indictment (p. 5).

"Second." Motion to compel election between counts (p. 5).

"Third." Challenging of jurors (p. 6).

"Fourth." Testimony on behalf of the Government (pp. 6–92).

"Fifth." *Testimony on behalf of defendant* (pp. 82–102). (Here follows the rebuttal testimony, apparently under the same numbered heading (pp. 103–108).

"Sixth." Charge of the court (pp. 108–140).

"Seventh." (Apparently, though the numbered heading is not inserted.) Exceptions to the charge (pp. 139–141).

"Eighth." The verdict (p. 141).

"Ninth." Motion for a new trial (pp. 141–144). (Here follows a motion in arrest of judgment, not numbered.)

"Ninth." (Number repeated.) Sentence.

It is respectfully submitted that the words "to all of which the defendant, John Pointer, then and there excepted," with which the bill of exceptions begins, are absolutely valueless. The case is in this respect similar to that of *Hanna* v. *Maas* (122 U. S., 24), where the whole mass of trial minutes was annexed as an appendix to a short bill, and where the bill of exceptions was held insufficient. The exception thus stated at the commencement of the record is an exception *to all* and not *to each*. It is therefore a general exception to everything that was done, and not a specific objection to anything, and for that reason also untenable. It would lead to extraordinary consequences even if the court should regard itself as having jurisdiction to amend "all" so as to read "each," for that would make defendant except to the admission of his own testimony on the stand. Moreover the exception is not to *rulings*, but to all *proceedings*.

We now come to the numbered heading "Third." This reads as follows:

> The defendant was furnished a list of jurors, thirty-seven in number, generally qualified under the law, that he might make his challenge from the list of thirty-seven of any number not to exceed twenty, and at the same time the prosecuting attorney had a duplicate list of the same names from which he could challenge any number not to exceed five, and the remaining first twelve names not challenged would constitute the jury. The defendant objected to this manner of selecting a jury; first, because it was not according to the rule prescribed by the laws of the State of Arkansas; second, because it was not the

> rule practiced by common law courts; third, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guarantied by the statutes of the United States, had been exhausted; fourth, because the Government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended.

It will be noted that there is *no exception stated* at this place, nor even a ruling of the court upon defendant's objection.

Even the point decided in the Lewis case, namely, that the defendant has the constitutional right to face the jury during the process of impanelling is not one that can be relied on without "a specific exception taken at the time by the prisoner;" for in *Alexander* v. *United States* (138 U. S., 353) the point was "not considered by this court, because it had not been properly excepted to at the trial." (*Lewis* v. *United States*, 146 U. S., 370, 379.)

In the Lewis case the exception was specific to the extent that it attacked the method of forming the jury and nothing else. It did not, however, attempt to specify the reasons for which the method adopted by the court was claimed to be illegal. In the Lewis case the proceedings appeared in the record as follows:

> Be it remembered that on the trial of the above entitled cause the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court

> further directed each side to proceed with its challenges *independent of the other and without knowledge on the part of either as to what challenges had been made by the other.*
>
> To which method of proceeding *in that regard* defendant at the time excepted, *but was required to proceed to make his challenges.*

The Lewis record proceeds to show that three jurors were challenged both by the defendant and by the Government, and ends as follows:

> To the happening of the fact *that both parties challenged the same three jurors*, the defendant at the time objected, but the court overruled the objection and directed the jury to be called from the said two lists, impanelled and sworn, to which the defendant at the time excepted.

It will be noticed that the objections upon which this exception was based were not specific in the sense of stating the reasons why the court's procedure was claimed to be illegal. The court said (p. 378): "We think that the general exception taken to the action of the court in describing the method of procedure is sufficient."

Now, in the case at bar, at the point above quoted from (p. 6) no general objection is made.

Specifically stating the grounds of the objection waives all grounds unspecified. (*Evanston* v. *Gunn*, 99 U. S., 660, 665, and cases cited; *Belk* v. *Meagher*, 104 U. S., 279–289.)

It will be noticed that no objection is specified on the ground that the prisoner was not present, or on the ground that the prisoner's counsel was not aware, in making his challenges, what names the district attorney was going to

strike off, or that there was any danger of the district attorney's striking off the same names himself. On the contrary, *it does not anywhere appear that the peremptory challenges were not made in open court, nor does it appear that the district attorney was not required to exhaust his challenges before the prisoner commenced.*

There is considerable variety in practices of different courts with respect to challenging, and considerable room left for discretion in the trial court, as will be seen by reference to the authorities collected in Thompson on Trials or any other book of procedure. In murder cases it is a matter in which the Arkansas practice does not rule. In *Lewis* v. *United States* the court, speaking by Mr. Justice Shiras, said:

> As we have already said, we do not deem it our duty to prescribe in this opinion rules to regulate the discretion of the circuit courts in the empanelling of jurors in criminal cases. *Perhaps* the preferable course would be for the circuit courts to adopt the methods prescribed by the statutes of the States, because such methods are familiar to the bar and the people of the States. If, however, the circuit courts choose to deal with such matters by rules of their own, we think it essential that such rules should be adapted to secure all the rights of the accused.

The specific objections here made are that the defendant would not know who the jury would be until the challenges were exhausted, and that the Government did not "tender to the defendant" the jury, but "tendered seventeen men instead of twelve." This point seems sufficienty covered by the opinion of Mr. Justice Parker at p. 142 of the record.

But the "third" heading does not exhaust the information afforded by the record as to the way in which the challenging was done in this case. While the "fourth" heading professes to state only the testimony it is in effect a transcript of the entire minutes of the trial, similar to the record discussed in *Hanna* v. *Maas* (122 U. S., 24), above referred to. It includes apparently every remark made by counsel or the court from beginning to end of the trial. It begins with the motion to quash the indictment. It then proceeds as follows:

> Mr. HODGES: The defendant some time ago was served with a list of thirty-seven jurors, and on the 16th of March he was served with an additional list. *We do not understand that in a case of this magnitude the jurors can be served by piecemeal, and desire to object to the method of serving.*
>
> The COURT: In the first place the list of thirty-seven was served, and it always happens that some of the original thirty-seven can not serve, by reason of incompetency or sickness, and out of an abundance of precaution we have the additional list served on the defendant, so that there will be a sufficient number served to go on with the trial of the case without waiting for two days' service on the defendant when the case is called for trial. It is not service by piecemeal, but service of additional talesmen.
>
> Mr. HODGES: I will just state, so that I will not appear captious, that in cases of this magnitude we deem it best to save all the exceptions possible, and hence I will just note that.
>
> Our exception is that we object to now being required to announce without being served with a full list of the jurors; that is, we do not announce at all, but are forced to, over our objection.

*The jury were then examined as to their qualifications, and thirty-seven men were found to be qualified to sit on this case;* whereupon the Government and defendant were each furnished with a list of the thirty-seven men so selected, and each were required to strike out those they did not wish to serve, the defendant being allowed to strike out twenty names and the Government five.

Mr. HODGES (of counsel for the defendant): I desire to save an exception to this method of forming the jury. It does not follow the State law of Arkansas, neither does it follow the common law, and we except to it on that ground. *The point we make is that the Government must offer us the twelve men they want to try the case.*

The COURT: They offered you thirty-seven.

Mr. HODGES (of counsel for the defendant): We understand, but we want to save that point.

It thus appears most clearly that the error found by the court in the Lewis case did not exist in this case, and that the points made by counsel in this case are totally different from those argued in the Lewis case.

In the Lewis case the facts are stated in the opinion of the court as follows:

> It appears by the record that on the trial of the case, and after the accused had pleaded not guilty to the indictment, the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, one to be given to the district attorney and one to the counsel for the defendant, and that the court further directed each side to proceed with its challenges, independent of the other, and without knowledge on the part of either as to what challenges had been made by the other.

It further appears by the record that to this method of proceeding in that regard the defendant *at the time excepted*, but was required to proceed to make his challenges; that he challenged twenty persons from the list of thirty-seven persons from which he made his challenges, but in doing so he challenged three jurors who were also challenged by the attorney for the Government.

It further appears that the Government, by its district attorney, challenged from the listof thirty-seven persons five persons, three of whom were the same persons challenged by the defendant, and that this fact was made to appear from the lists of jurors used by the Government in making its challenges and the defendant in making his challenges.

To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection, and directed the jury to be called from the said two lists, impaneled and sworn, to which the defendant at the time excepted. * * * Although the record states that after the challenges the twelve jurors who remained were sworn, yet it clearly appears from the whole record, and the lists therein referred to, that after the challenges there remained, not only twelve, but fifteen jurors, and that by the mode adopted, which required the prisoner to challenge by list, he exhausted some of his challenges by challenging jurors at the foot of the list, and who were never reached to be sworn as jurors in the case. *And the record does not disclose that at the time the challenges were made the jury had been called into the box; nor that they or the prisoner were present at the time the challenges were made.* It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that, when the jury answered to said call, they were present so that they

> could be inspected by the prisoner; and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that *the prisoner was not brought face to face with the jury until after the challenges had been made, and the selected jurors were brought into the box to be sworn.* Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The reason why the prisoner's presence is required is stated by the court as follows (p. 373), quoting from *Hopt* v. *Utah* (110 U. S., 574):

> The prisoner is entitled to an impartial jury, composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors.

See also cases cited from Howard's State trials, on page 377.

In the case at bar it affirmatively appears that the jury were examined in open court as to their qualifications, and thirty-seven men found qualified to sit in this case *after* the colloquy took place between the court and defendant's counsel with reference to the regularity of the

lists of jurors furnished, and *before* the lists were furnished for the purpose of peremptory challenges. The defendant thus had the opportunity of seeing each one of the thirty-seven jurors while he was on examination. Under these circumstances it can hardly be deemed necessary that the jurors should be required to step again, one by one, into the jury box for the purpose of receiving the peremptory challenges. On the contrary, Judge Parker shows strong reasons for believing the other practice better.

We understand this point of the failure to confront defendant with the proposed jurymen before the challenges to be the real point of decision in the Lewis case. The following remarks of Mr. Justice Shiras, on page 379, seem to indicate that the order of challenging is within the discretion of the court below, and that it would be proper to order the defendant to make all of his challenges before the district attorney was required to exercise his corresponding right.

> It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes. In fact, it does not clearly appear which side made the first challenges, or that the defendant had not exhausted his challenges before the Government challenged the three jurors in question. If it were a fact that the defendant had made his twenty challenges before the Government had challenged these three men it is difficult to see how his rights were prejudiced by the action of the district attorney, but we should hesitate to affirm this judgment upon a record giving us so little information as to the history of the trial in these respects.

The authorities on these subjects are collated in 1 Thompson on Trials, § 88 *et seq.* Usually in the case of each juror the district attorney is not called upon to decide until the prisoner's counsel has waived his right of challenge. (*Id.*, §§ 94, 95.)

There is no proper exception, however, even on page 7. Defendant's counsel does, indeed, say of the failure to serve a list of talesmen: "In cases of this magnitude we deem it best to save all the exceptions possible, and hence I will just note that." And again of the failure to offer twelve men: "We understand, but we want to save that point." But these are not exceptions. They are only notes from which exceptions are hereafter to be drawn up.

> The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party in order to entitle himself to such revision must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains. * * * Minutes of the judge or clerk or notes of a stenographer can not take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up. * * * The exceptions must be drawn up and settled in proper form in the court below, and can not be amended or redrafted in this court. (*Hanna* v. *Maas*, 122 U. S., 24, 26, *per* Mr. Justice Gray.)

It is, therefore, respectfully submitted that the second assignment of error is not well taken, because:

(1) The record does not contain the language that was fatal to the Lewis case.

(2) No exception raises the point.

(3) The exceptions taken operate as a waiver of the point.

(4) The record affirmatively shows that the jury were examined, in view of the prisoner, before the challenges were made.

## THIRD.

Defendant moved to compel an election between the various counts of the indictment. Two of these counts were for the murder of Vandiveer and two for the murder of Bolding, the statement being slightly different, as is usual in such cases. No exception was taken at the time to the ruling of the court, unless the general exception at the opening of the record should be so considered, as to which our argument will be found under the second assignment. The joining of counts is specially permitted by statute. (Rev. Stats., § 1024.)

## FOURTH.

### OBJECTIONS TO THE CHARGE.

### I.

The first objection is a repetition of the claim made in the motion to compel election.

## II.

Objection was taken to the court's action in taking judicial notice that the place where the bodies were found was in the western district of Arkansas. This assignment is fatally defective, because it misstates the exception as taken at the trial. The passage excepted to at the trial is as follows (p. 140):

> If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of the court. If you believe that the bodies were found at a point 12 miles east of Hartsborn and 3 miles west of Wilburton and 27 miles east of South McAlester, and from one-half to one-fourth of a mile south of the Choctaw railroad track, such place would be in the territorial jurisdiction of this court.

The passage recited in the assignment of error is as follows (p. 147):

> In addition, it must be shown that the act of killing was committed within the jurisdiction of this court. That is, within the geographical jurisdiction within the country over which this court has jurisdiction, or in other words, done in the western district of Arkansas. If the killing was done at or near where the bodies were found, the place of the killing would be in the western district of Arkansas, and in the jurisdiction of this court.

The court, however, was clearly entitled to take judicial notice of the limits of its own jurisdiction. (*Hoyt* v. *Russell*, 117 U. S., 401, 404.) The western district of Arkansas, by section 533 of the Revised Statutes, includes "the country lying west of Missouri and Arkansas, known

as the Indian Territory." By the act of January 6, 1883, c. 13, the bulk of the so-called Indian Territory was taken away from the western district of Arkansas and annexed in part to the district of Kansas, in part to the northern district of Texas. The portions, however which were "set apart and occupied by" the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes were left within the western district of Arkansas by that act. It can not be necessary that, to test the question whether the Arkansas or the Texas court has jurisdiction of a murder case, the individual occupancy of the particular acre of ground on which the body was found should be inquired into. The phrase "set apart and occupied by" the Choctaw Nation must as its only reasonable interpretation be held to cover all the territory set apart for the benefit of the Choctaw Nation and included on the map under the name "Choctaw Nation," whether it be actually occupied by a Choctaw Indian or by a white man holding by permission of the Choctaw tribe, or whether it be unoccupied altogether. The boundaries of the Choctaw and Chickasaw nations are laid down by treaty and well known, and it was admitted by the prisoner himself (p. 86) that the crime was committed "in the jurisdiction of the Fort Smith court."

## III.

Defendant excepted to the instruction that "it is not necessary that the proof show that a motive for the act done existed" (p. 140). This is extended in the assignment of error to cover a portion of the charge not ex-

cepted to (p. 147). To understand the clause excepted to, the remarks immediately following in the charge should be read (p. 112).

> There always is a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it can not be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it; they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it can not be fathomed, and as it does not require impossibilities it does not require the jury to find it.

This statement is in line with all the authorities. Greenleaf (1 Greenleaf on Evidence, § 34) and other writers say that malice is presumed from the mere fact of killing. The principle is also sometimes stated in the form that malice is to be presumed from the unlawful use of a deadly weapon resulting in death. (2 Bishop on Crim. Law, § 680, and cases cited). The word "unlawful" involves a *petitio principii*. Whether it was unlawful or justified by necessity of self-defense or otherwise is what the jury are to ascertain. The whole discussion has been criticised on the ground that there can never be any such thing as killing in the abstract, but that some circumstances always appear in addition to the fact of homicide. (Wharton's Crim. Ev., §§ 736, 738). It does, however, sometimes appear that the killing was done by a certain person, while

there is no evidence whether the killing was in self-defense or not; and in such cases it has always been held proper for the jury to convict the prisoner. This involves a presumption of malice from the use of a deadly weapon resulting in death. The presumption when indulged in is one of fact and not of law; there can be no presumption of law, properly speaking, available to the prosecution in such a case, for if there were, a conviction could be directed. But it is clear that the jury may make use of the presumption in the absence of all evidence as to the circumstances of the affray. Otherwise, if the only direct evidence was the prisoner's, and he set up a plea of self-defense, no matter how improbable, an acquittal would often be necessary.

In the well-known case of *Commonwealth* v. *York* (9 Met., 93, 114), Chief Justice Shaw said that where there is no proof of "provocation or sudden quarrel" "the law presumes malice from the act of killing, unless the matter of excuse or extenuation affirmatively appears." This doctrine was afterwards confined by him to cases "where the killing was proved to have been committed by the defendant and nothing further is shown." (*Commonwealth* v. *Hawkins*, 3 Gray, 463.)

There has been difference of opinion as to how far malice may be presumed; but we do not find that there has ever been doubt of the fact that motive is an element that it is unnecessary to prove.

> The particular motive may be beyond the reach of conjecture, and especially of evidence. Hence proof of motive is never indispensable to conviction. (1 Bishop on Crim. Proc., § 1107, and cases cited.)

In *McLain* v. *Commonwealth* (99 Pa. St., 86, 89), Mr. Justice Mercur, in rendering the opinion of the court, says:

> It was further urged that no adequate motive was shown to induce the accused to commit the crime charged. The court well said the Commonwealth was not bound to establish an adequate motive for the alleged crime, and declared, in the words of this court: "The fact of murder being established, the inability to discover the motive does not disprove the crime."

In *Clifton* v. *The State* (73 Ala., 473), the defendant, in a prosecution for wanton injury to a railroad, asked the judge to charge that, "if the jury believe from the evidence that the State has failed to show any motive whatever on the part of the defendant to commit the offense charged, then this absence of motive may, of itself, generate that reasonable doubt in the minds of the jury which would require them to acquit the defendant." The request was refused and the judgment affirmed on appeal.

Brickell, C. J., said:

> The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry; * * * but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution, whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence, that a motive or inducement to commit the offense should be proved. The criminal act, and the connection of the accused with it, being proved beyond a reasonable

> doubt, the act itself furnishes the evidence, that to its perpetration there was some cause or influence moving the mind.

And said that the instruction asked would have misled the jury unless supplemented with the statement "that if the criminal act and the connection of the appellant were clearly proved, the absence of evidence of motive was immaterial." (See also *Green* v. *State*, 38 Ark., 304; *State* v. *Whitman*, 14 Rich. Law, 113; *People* v. *Minisci*, 12 N. Y. State Rep., 719; *Hornsby* v. *State*, 94 Ala., 55, 67; 3 Greenleaf on Evidence, § 144.)

Defendant could not have been harmed by these remarks of the court, for ample motive was shown in defendant's actions after the homicide—taking the watch, money, etc., and trying to sell the horses and wagon belonging to the murdered men.

## IV.

Defendant's counsel excepted to the use by the court of an illustration based on a murder case in England. The topic under discussion was the possibility of a crime being committed for so comparatively trivial a reason as the possession of the horses and wagon, etc. The illustration was as follows (p. 113):

> So also for the smallest plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car; Briggs was asleep; the watch was exposed, and Muller killed Briggs by a

> sudden attack and succeeded in making his escape; he was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime with the murder. Until the confession, the justice of the conviction was largely criticised on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great.

The use of such illustrations in instructing the jury may be criticised, but it is common, and it is hardly the subject of exception. We do not find any precedent of a reversal for this reason; on the other hand, the practice is approved within proper limits (2 Thompson on Trials, §§ 2315, 2321).

In *Masters* v. *Town of Warren* (27 Conn., 293, 299), Ellsworth, J., said:

> The next objection is that the judge in his charge narrated a recent incident of a like character with the one on trial, which had happened in his own neighborhood, which narration the defendants insist was calculated to make an improper impression upon the minds of the jury. The objection is substantially that the judge stated a fact which had not been sworn to on the trial. But it was not stated as a fact belonging to the case, and was presented only for the purpose of illustration. This is a common practice in our courts. No intelligent juror can be deceived by such illustrations. And whether the judge in commenting upon the facts of the case has made use of too strong language, or has gone too far in using by way of illustration, historical or personal incidents of a kindred character to those on trial, is not for us to say. He has a right to illustrate his views as he pleases, and a rule requiring that a rigid criti-

cism should be applied to such expressions, would impose upon the judge an unreasonable restraint, and lead to great inconvenience.

See also *Melledge* v. *Boston Iron Co.* 5 Cush., 158, 180; *Boyd* v. *United States*, 142 U. S., 450, 456.

If any illustration can be used, this was certainly an apt enough one for the point under discussion.

V.

Defendant excepted "to all of that portion of the charge which defines and explains accidental killing. There was no proof to justify such charge" (p. 141). The exception is so general as to be of no value (*Bogk* v. *Gassert*, 149 U. S., 17, 25–6; *Connecticut Mutual Life Insurance Co.* v. *Union Trust Co.*, 112 U. S., 250, 260–261. See also cases on exceptions to charges cited in brief in *Graves* v. *United States*). Of course, an exception not specific when taken can not be made specific afterward by an assignment of error.

In his assignments of error defendant attempts to fix the exception upon a passage read by the court from a previous charge of its own in the murder case of Boyd and Standley. It merely amounts to saying that the charge of murder involves the element of intention as distinguished from accident in killing (p. 117.) Defendant's counsel say in explanation of the assignment that no such defense as accidental killing was relied upon. Defendant, however, testified that his actions were in self-defense and without intention of killing his assailant, who attacked him unexpectedly. The charge can not have injured de-

fendant in this particular. In general, charging on immaterial questions is not assignable error (2 Thompson on Trials, § 2315).

## VI.

Is a general assignment of error that the court in explaining the law of manslaughter tried to convince the jury that defendant was not guilty of manslaughter, but of murder. This is not sufficiently specific, nor was there any evidence tending to show manslaughter.

## FIFTH.

Defendant excepts to the whole charge as vague, uncertain, and "so voluminous that a juror of ordinary understanding could not understand what the court meant. The charge does not apply the law to the facts of the case, and tell the jury under what state of facts the defendant would be guilty and under what state of facts he would not be; hence defendant excepts to said charge in whole and in part *as specified*."

There are certainly some correct propositions in the charge, and therefore the exception to the charge as a whole is without avail.

## SIXTH.

This assignment of error is a repetition of matters above discussed.

It is respectfully submitted that the judgment should be affirmed.

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No. 15058.

# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN POINTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 759.

## SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.

# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN POINTER, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 759.

**SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.**

Plaintiff's brief is now filed, nearly three weeks after the case was reached for argument, and a week after his extension of time expired.

Making no point of the default, since it is a capital case, we respectfully beg leave to submit this supplement to the argument heretofore submitted on behalf of the Government.

Plaintiff in error states that an amendment has been made by the circuit court to the record of this case. This amendment appears to be identical with that made to the record in the case of *Brown* v. *United States*, No. 758, decided by this court November 6, 1893, and discussed in the brief therein submitted by the Government.

No application has been made by either party to amend the record in this court, and the case must therefore be decided upon the record originally filed (which we believe does not practically affect the result).

Plaintiff in error raises technical objections to the judgment and sentence, which are not assigned for error. It is claimed that the judgment and sentence are defective for failing to state in the recitals the crime of which he was found guilty. Upon this point we refer only to section 1025 of the Revised Statutes. He objects, also, that the verdict was not recorded. We are unable to understand this objection, as the clerk certifies at the end of the transcript that the verdict is a part of the record. Nor would the failure to record the verdict, if such a proceeding were required by statute, be fatal. (*Dawson* v. *People*, 25 N. Y., 399, 405.)

Plaintiff in error also calls attention to the peculiar form of the sentence in the case. He was convicted for two murders. The learned court sentenced him generally to be hanged, without specifying that the hanging was to be for either murder or for both (p. 145). The court then, apparently as an afterthought, suspended the sentence on the third count of the indictment, on which plaintiff in error was convicted for the killing of Bolding (p. 146). The latter order certainly does not prejudice defendant and can be thrown out of consideration.

It appears, then, that the prisoner having been found guilty upon two counts, for either of which he could be hanged, was sentenced to be hanged generally for both. This certainly can not prejudice him. The sentence was

therefore sufficient even at common law. (1 Bishop Crim. Proc., § 1327.) The common-law rule is reaffirmed by section 1025 of the Revised Statutes. The judgment and sentence in this case follow the precedent set by Mr. Justice Nelson and Judge Hall in the first case decided under the statutes allowing joinder of different offenses. (*United States* v. *Albro*, cited in *People ex rel. Tweed* v. *Liscomb*, 60 N. Y., 559, 588.) In a capital case it is unnecessary to consider the questions discussed in Tweed's Case just cited, in the Tichborne Case (*Castro* v. *The Queen*, L. R., 6 App. Cas., 229), in 1 Bishop Crim. Proc., § 1327, and similar authorities.

In addition to section 1024, relied upon in our brief for the proposition that the court could properly in its discretion direct the prisoner to be tried for both murders at the same time, since they were part of the same transaction, we beg to refer also to *In re Henry*, 123 U. S., 372, 374; *Harman* v. *Commonwealth*, 12 Serg. & Rawle, 69, Tilghman, C. J.; *Carlton* v. *Commonwealth*, 5 Met., 532, Shaw, C. J.; *Commonwealth* v. *Hills*, 10 Cush., 530; *State* v. *Nelson*, 29 Me., 329; *Ex parte Hibbs*, 26 Fed. Rep., 421, 427; *Ex parte Peters*, 2 McCrary, 403; *United States* v. *O'Callaghan*, 6 McLean, 596; *United States* v. *Bennett*, 17 Blatch., 357; Wharton's Criminal Pleading and Practice, §§ 293, 294, 910.

Respectfully submitted.

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